(24,241)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 21, 1915.

[redacted]

1-4 BANK OF STAPLEHURST
v.
YATES.

No. 17277.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol in the City of Lincoln, in said State, on the 6th Day of Jan., 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk*.

Be it remembered. That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court a certain Praecipe, in the words and figures following, to-wit:

* * * * * * *

5 Afterwards, on the 16th day of March A. D. 1899, there was filed herein a certain amended petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, a Corporation Duly Organized and Doing Business at Staplehurst, Nebraska, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, DAVID E. THOMPSON, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

6 The plaintiff for its amended petition complains of the defendants and alleges that the plaintiff is a corporation duly organized and doing a general banking business, with its principal place of business at Staplehurst, Nebraska.

That on, Prior, and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they acted as such officers and directors and as such had the control and

management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska.

That acting as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its books; to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said Bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements; to see that the valuable effects, assets, and other matters including the cash on hand and in other Banks or depositories agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said bank, and by reason of such fail-
7 ure, large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers, and to those who were relatives and favorit*ics* of the defendants as officers or acting officers of the Bank.

That the books of said Bank were out of balance, that they allowed and permitted forced balances to be made and carried on the Bank books, the deposit account was falsified, being greatly under stated, the real estate, bills receivable, and deposit account each being largely inflated that they permitted to be carried on the books of the bank and permitted and caused to be (printed and) published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or overdue without taking steps to collect or secure the same, whereby the same were lost to the Bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless, and of no value, and from time to time they published, permitted, allowed and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff

and sent by defendants and their agents to plaintiff through
8 the U. S. mails and otherwise that such notes, bills receivable, and other worthless assets were good and collectible and part of the valuable resources and effects of said Bank when in truth and in fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken; and the published statements and advertisements and the statements sent by defendants to plaintiff as aforesaid and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisement and the statements sent by defendants to plaintiff as aforesaid showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and its said business, and all of which said facts and circumstances the defendants, and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid, the defendants made, caused, allowed and permitted to be made and sent & delivered to plaintiff statements of its condition, statements to the plaintiff and the public showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause, allow, and permit to be published and sent and gave to plaintiff said statement showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent
9 until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after the said Bank became insolvent as aforesaid the said defendants permitted said Bank to continue in business and receive deposits from Plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting as directors but of the insolvency of said Bank this plaintiff was at all times entirely ignorant.

That while said bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers as aforesaid, caused & permitted to be made & sent & delivered to plaintiff statements of the bank's condition setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to deposit and keep money in said bank and the plaintiff relying upon said published statements and upon the statements of its financial condition sent to and received by plaintiff as aforesaid as it had the right to

do, deposited and loaned its money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein but on account of the false statements referred to aforesaid it allowed the same to remain on deposit when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said Bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in
10 a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid; the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made, caused, allowed, and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement is hereto attached and marked "Exhibit A" which said statement was made, caused, allowed, and permitted to be made by the said defendants acting as such directors and officers of said Bank, for the purpose of deceiving the plaintiff and others and induce the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date caused, allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers aforesaid were of general circulation in the State of Nebraska, and said defendants on or about said date sent & caused to be sent & received by plaintiff said false & untrue statements aforesaid.

Plaintiff further avers that on the 28th day of December 1886, the said defendants and each of them acting as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid, and solvent, and to induce the plaintiff and others to do business with said Bank as aforesaid made, caused, allowed and permitted to be made, a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked "Exhibit B" and caused allowed and per-
11 mitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska, and sent & caused to be sent to, & received by plaintiff said false & untrue statements aforesaid for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank, when in truth and in fact said Bank was not in a sound, solid, safe and solvent condition but was wholly insolvent.

This plaintiff avers that on and between July 23rd, 1884 and

January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time allowed caused and permitted to be made at divers intervals false statements of the condition of said Bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused acqu-esced in, allowed and permitted said false statements and each of them severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, and sent & caused to be sent to, and received by plaintiff said false statements aforesaid through the U. S. mails & otherwise & which were received by plaintiff.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements, represented that said Bank was in a thoroughly sound, safe, and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe Bank in which to make deposits and loans of money and said statements were prepared and published and were
12 caused, permitted and allowed to be prepared and published and sent and delivered to plaintiff by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published and as sent and delivered to and received by plaintiff stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the officers of the plaintiff corporation, which officers were in the full control and management of plaintiff's business and plaintiff avers that it believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time, the exact times of which plaintiff cannot at this time state—the said defendants had conversations with the officers of plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1881 and January 21st, 1893, in which said conversations said defendants represented said Bank, of which they were directors and acting directors and officers was thoroughly safe and sound, and believing said published statements and advertisements and said statements of its financial condition so sent and received by plaintiff as aforesaid and said verbal representations so made by said defendants to be true and believing them to be true and relying upon the same, that said Bank was sound, solid and solvent and doing a flourishing and prosperous business as said published statements and advertisements and other statements as aforesaid showed and as represented in said verbal statements, and statements sent to plaintiff by defendants and by plaintiff received & examined this plaintiff on the 11th day of February 1885, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money and continued to loan
13 and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of

January, 1893, which said sums of money so loaned and deposited with said Bank varied as Plaintiff during all of said period withdrew and reloaned to said Bank said divers sums of money, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to its credit amounting to Eight Thousand One Hundred Fifteen and 34/100 ($8,115.34) Dollars, money it had loaned to and deposited with said Bank, and from January 1st, 1893, to and including Jan'y 21st, 1893 (the day said Bank closed its doors and ceased to do business), the plaintiff loaned and deposited with said Bank the following sums of money, to-wit:

January	2nd,	1893	$547.90
"	3,	"	503.00
"	5,	"	527.62
"	6,	"	800.00
"	7,	"	1,324.57
"	7,	"	306.00
"	9,	"	2,693.16
"	10,	"	39.25
"	11,	"	1,357.42
"	12,	"	3,103.42
"	14,	"	632.01
"	16,	"	2,046.00
"	16,	"	168.59
"	16,	"	139.23
"	18,	"	1,507.38
"	18,	"	1,293.04
"	19,	"	215.00
"	20,	"	890.00
Balance due plaintiff on January 1st, 1893			8,115.34
Making total amount due plaintiff from Capital National Bank			$26,210.93

That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $11,264.11, leaving still due and owing from said Capital National Bank to the plaintiff the sum of $14,946.82, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated.

14 Plaintiff avers that said statements so sent to and received by plaintiff aforesaid and advertisements and statements so published as aforesaid, and said statements as verbally announced to the officers of said plaintiff, were as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements and each of them, as well as said verbal statements made and caused, allowed and permitted to be made to the officers of plaintiff as aforesaid, showed

that said Bank was sound, solid and solvent and doing a flourishing business, when in truth and in fact said Bank was not doing a flourishing and prosperous business, and was in fact at the time said statements and advertisements were published and verbally made, and said statements so sent to and received by plaintiff in an unsafe, precarious and insolvent condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made said statements so sent to & received by plaintiff and advertisements as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting as directors and they and each of them willfully, negligently and recklessly for the purpose and with the intent aforesaid made, and caused, allowed and permitted to be published said false statements and advertisements and sent to and caused to be received by plaintiff such false & untrue statements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

Plaintiff further avers that its knowledge of the condition of said Bank was wholly derived from said published statements and advertisements by said statements so sent to and received by plaintiff and by said verbal statements so made to its officers by said defendants and that had said statements and advertisements so published and said statements so sent to and received by plaintiff and as verbally made as aforesaid set out and given the true condition of said Bank, it would have appeared and would have been shown that said Bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and sending to & causing to be received by plaintiff said statements and making said verbal statements by said defendants to the officers of plaintiff as aforesaid, insolvent and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had in said statements and advertisements and verbal statements made as aforesaid, and that by reason thereof said Bank could not pay and did not pay this plain-

tiff any part of said sum of money loaned and deposited with said Bank, except the sum of $2,241.22, and that the remainder of said money so loaned and deposited with said Bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars.

Wherefore plaintiff prays judgment against the defendants and each of them for the sum of Twenty Thousand ($20,000) Dollars, its damages, with interest thereon from January 21st, 1893, at 7 per cent and costs of suit.

BANK OF STAPLEHURST, NEBRASKA,
Plaintiff.

By BURR & BURR,
GEO. W. LOWLEY, &
BIGGS & THOMAS,
Its Attorneys.

* * * * * * *

17 "EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and Discounts	768,601.44
Overdrafts secured and unsecured	6,217.74
United States bonds to secure circulation	50,000.00
Stocks, securities, etc	325.00
Due from approved reserve agents	107,090.01
Due from other National Banks	17,800.33
Due from State Banks and Bankers	5,394.72
Banking house, furniture and fixtures	5,770.00
Other real estate and mortgages owned	38,716.92
Current expenses and taxes paid	14,286.28
Checks and other cash items	3,698.56
Exchange for clearing house	8,841.16
Bills of other Banks	2,355.00
Fractional paper currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes	17,431.00
Redemption fund with United States Treasurer (5 per cent circulation)	1,350.00
Total	$1,074,867.37

Liabilities.

Capital Stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$355,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	
		643,632.24
Notes and bills rediscounted		59,054.38
		$1,074,867.37

18 STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL. C. YOUNG,
Notary Public.

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

Loans and discounts	737,462.12
Over drafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stock, bonds, and mortgages	22,739.34
Due from approved and reserve agents	74,068 63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other cash items	13,742.02
Bills of other Banks	3,712.00

Fractional paper currency, nickels and cents		216.42
Specie		27,358.00
Legal tender notes		10,400.00
Redemption with U. S. Treasurer (5% circulation		1,900.00
Total		$1,035,448.92

19 & 20 Liabilities.

Capital stock paid in		300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,932.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.94
Notes and bills re-discounted		52,090.60
Total		$1,035,448.92

THE STATE OF NEBRASKA,
Lancaster County, ss:

I, C. W. Mosher, President of the above bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

* * * * * * *

21 Afterwards, on the 15th day of July, 1901, there was filed herein a certain answer of David E. Thompson, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER et al., Defendants.

Separate Answer of David E. Thompson to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendant David E. Thompson, and in obedience to the order of the court, makes answer for himself to the plaintiff's petition as amended by interlineation on the 16th of March 1899.

This defendant says that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, this defendant has not knowledge or information and therefore denies that such deposits were made.

First Defense.

This defendant for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and
22 Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank, and the defendant David E. Thompson was a director for a short time in said bank, but was not such director at the time any of the deposits were alleged to have been made by the plaintiff in the Capital National Bank, and during such time he was simply stockholder in said bank.

That said bank was closed by the national bank examiner on or about the 23rd day of January 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any Court, for reason of the violation of the national banking act by the directors and officers of said Bank, or for any other reason.

That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

This defendant denies that he signed or attested the reports set out and referred to in the said amended petition, and denies that

he made, signed or attested any report purporting to show
23 the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

This defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by this defendant as a director or stockholder of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a federal question is involved in determining the liability of this defendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant.

This defendant further answering for himself, denies each and every allegation in the plaintiff's petition except as hereinbefore stated or admitted.

Second Defense.

This defendant further says for himself, that the plaintiff on or about the 27th day of October, 1893, brought an action against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska, was duly made and after
24 the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Bank of Staplehurst to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action, and a judgment for costs was rendered in said court against the plaintiff and in favor of the defendants and the other defendants herein in the sum of $125.73 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

This defendant therefore avers that the plaintiff, under the law and the practice, is and ought to be barred and estopped from prosecuting this defendant on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiffs pretended cause of action as set forth in its petition as now amended, this defendant says for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895, by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant, Ambrose P. S. Stuart, for the full amount of its claim made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bank of Staplehurst and against the said defendant Stuart has not been reversed or set aside, but in due course of time, executions were issued on said judgment for the collection of the
25 same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff Bank of Staplehurst. And this defendant alleges the fact to be that the plaintiff's claim against this defendant and the other defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged and that said judgment so taken by the said Bank of Staplehurst against the said defendant Stuart and the payment thereof, is a complete bar against any further judgment or claim in favor of the said plaintiff against this defendant and the other defendants in said cause.

Fourth Defense.

This defendant for a further and separate defense to the plaintiff's cause of action, says that as hereinbefore alleged in the first defense in this answer, this defendant in all of his actions concerning and in connection with the said bank, acted in his capacity as director or stockholder of said national bank, and if he neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages, said cause of action existed, if any, in favor of the said Bank or the receiver of said bank after his appointment, and not in favor of this plaintiff.

This defendant alleges the fact to be that if the plaintiff deposited its money in the said bank as alleged and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank; and that the said money as
26 as well as any damage caused by the alleged neglect of duty on the part of this defendant, did not give rise to any cause

of action in favor of this plaintiff; but alleges the fact to be that if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

This defendant for himself denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

This defendant therefore alleges that the plaintiff has no cause of action against this defendant.

Wherefore, the defendant prays judgment for costs.

J. W. DEWEESE &
F. E. BISHOP,
Attys. for Defts.

* * * * * * *

27 Afterwards on the 15th day of July, A. D. 1901, there was filed herein a certain Answer of Chas. E. Yates and Ellis P. Hamer to amended petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER et al.

Separate Answer of Charles E. Yates and Ellis P. Hamer, to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now come the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the court, each makes answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th of March, 1890.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, these defendants have not knowledge or information and they therefore deny that such deposits were made.

First Defense.

These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank

and Richard C. Outcalt was the ca-hier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge
28 of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks.

That a federal question is involved in determining the lia-
29 bility of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense.

These defendants further say, each for himself that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the district court of Lancaster, County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from

the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Bank of Staplehurst to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said court against the plaintiff and in favor of the defendants in the sum of $125.93 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and the practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895 by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of its claim as made against all of the defendants, the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bank of Staplehurst and against the said defendant Stuart has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff. Bank of Staplehurst. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged and that said judgment so taken by the said Bank of Staplehurst, against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense.

These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first

defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained
31 of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the fact to be that if the plaintiff deposited its money in the said bank as alleged and the bank then failed and became insolvent the plaintiffs could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants, therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL, AND
FRANK E. BISHOP,
Attys. for Defts.

* * * * * * *

32 & 33 Afterwards, on the 24" day of August A. D. 1901 there was filed herein a certain Reply, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER et al., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, David E. Thomson, and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher,

David E. Thompson and Richard C. Outcalt, and denies each and every allegation of new matter contained in their several answers.

BANK OF STAPLEHURST,
By E. JACOBS, *President.*

* * * * * * *

34 *Stipulation.*

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward County, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and produced and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in so far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of
35 & 36 the court may warrant;

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and direction of the Court, subject *of* the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases. And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorneys for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

37 Afterwards, on the 14th day of October, A. D. 1908, there was filed and entered of record herein a certain Mandate from the Supreme Court of Nebraska, in words and figures following to-wit:

Mandate.

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, September Term, 1908.

To the District Court of the Fifth Judicial District, Sitting in and for the County of Seward, Greeting:

Whereas, in a late action before you, wherein the Bank of Staplehurst, a corporation organized and doing business at Seward, Nebraska, was plaintiff, and Charles W. Mosher, Homan J. Walsh, Ellis P. Hamer, revived in the name of Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, Charles E. Yates, Ambrose P. S. Stuart, David E. Thompson, Richard C. Outcalt, and Rollo O. Phillips, were defendan-s, the said plaintiff recovered a judgment against the said defendants Charles W. Mosher, Charles E. Yates, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, David E. Thompson, and Richard C. Outcalt, upon
38 a transcript of which record and proceedings in your said court the said defendant Charles W. Mosher, Charles E. Yates, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, David E. Thompson, and Richard C. Outcalt each prosecuted a petition in error to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court, during the September term, 1905, upon an opinion by the Commissioners of said Supreme Court filed in said cause, it was considered by said Court that the judgment entered by you in favor of said plaintiff and against said defendants be affirmed at the costs of said defendants, taxed at $—.

That afterwards, upon a writ of error issued out by said Charles W. Mosher, Charles E. Yates, David E. Thompson, Louisa Hamer,

administratrix of the estate of Ellis P. Hamer, deceased, and Richard C. Outcalt, said cause was appealed to the Supreme Court of the United States, wherein, during the October term, 1905 thereof, the said cause coming on to be heard before the Supreme Court of the United States, in consideration whereof it was ordered and adjudged by the said Supreme Court of the United States that the said judgment of our Supreme Court in this cause be reversed with costs, and the said Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover against the said The Bank of Staplehurst the sum of $584.75 for their costs therein expended and that execution issue therefor. And it was also by said Supreme Court of the United States ordered that the said cause in the said Supreme Court of the United States as to said Charles W. Mosher and Richard C. Outcalt, be dismissed for want of prosecution; and it was by the said Supreme Court of the United States further ordered that said cause be, and the same duly was remanded to *our* Supreme Court for further proceedings not inconsistent with the opinion of said Supreme Court of the United States.

That afterwards, and on the 4th day of May, 1908, said mandate from the Supreme Court of the United States was duly filed in this court: that afterwards, to-wit, on October 8, 1908, upon a
39 trial of said cause in the Supreme Court of the State of Nebraska, it was considered by said court that the judgment entered by you in favor of said plaintiff and against said defendants Charles E. Yates, David E. Thompson, and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover of and from the said plaintiff, The Bank of Staplehurst, three-fifths of their costs expended in this court, taxed at $90.93, (total costs in this court being $151.55) and that execution be awarded therefor.

Now, Therefore, You are commanded, without delay, to proceed according to law.

Witness, The Honorable John B. Barnes, Chief Justice, and the seal of said Court, at Lincoln, this 12th day of October, 1908.

[SEAL.] H. C. LINDSAY, *Clerk*.
VICTOR SEYMOUR, *Deputy*.

Afterwards, on the 17th day of February, A. D. 1911, there was filed herein a certain Request for findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer et al., Defendants.

Request of Defendants for Special Findings.

40 The defendants, Charles E. Yates and Louisa P. Hamer as administratrix of the Estate of Ellis P. Hamer, deceased,

each separately and for each one alone, requests the court to make and find the following special findings of fact and of law.

I.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in her favor.

III.

That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank;

V.

That the defendant Cha*l*res E. Yates and the deceased, Ellis P Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank
41 or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI.

That the plaintiff was not induced or influenced by any parol or oral statement or representation of the defendant Yates or of the deceased Hamer either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII.

That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date

December 28, 1886, and of date December 9, 1892, exhibits "A" and "B", attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery:

VIII.

That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained;

IX.

That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital Na-
42 tional Bank, nor of any of the items of either its assets or liabilities;

X.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case;

XI.

(A) That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual personal knowledge or intentionally made, published or declared, or permitted to be made, published or declared, any untrue statement, report or representation of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (B) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants acted in good faith, honestly believing that said statements, reports and publications were true and without and knowledge or intention that any of said statements, reports and representations were untrue.

FRANK E. BISHOP,
For Defendants Yates and Hamer, as Adm'x.

And again on February 17th, A. D. 1911, there was filed herein a Request of D. E. Thompson, for Special Findings, in words and figures following, to-wit:—

43 In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, Administrat-*or* of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Request for Special Findings.

Defendant, David E. Thompson, requests the court to find specially from the evidence touching the following facts in issue:

1. Whether the allegations contained in the petition to the effect that defendant Thompson failed to perform his duties to personally manage and superintend the business of the Capital National Bank, to examine the loans and securities, to see that the general condition of the bank corresponded with its books, to see that only good bills receivable were entered upon the bank books and in its statements, and that assets which were worthless or of little value were charged off and including all allegations of official misfeasance and mismanagement are sustained by the evidence and whether plaintiff is entitled to recover from this defendant by reason thereof.

2. Whether this defendant at any time prior to the suspension or failure of the Capital National Bank made any oral statement or representation touching the pecuniary worth, standing or responsibility of the said bank, to the plaintiff or to the witness E. Jacobs, the cashier of plaintiff.

3. Whether the plaintiff was induced or influenced by any oral statement of this defendant to deposit any funds in the Capital National Bank.

44 4. Whether this defendant, at any time prior to its failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency and referred to in the petition or the evidence were in any material respect false and untrue.

5. Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency, other than the five several reports dated respectively, December 28, 1886, August 1, 1887, October 2, 1890, and December 19, 1890, and July 9, 1891.

6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith.

7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently and with actual personal knowledge that such reports or any one of them were in any material respect false and untrue.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

Afterwards, on the 1st day of April, 1911, there was filed herein certain requests for additional findings, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

45 BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the Court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the Comptroller and printed in the newspaper and the names of the directors of the bank.

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, requests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the Comptroller and printed in the newspapers and the names of the directors of the bank.

16. That the evidence does show said Hamer personally took part in the preparation nor distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the bank, showing its assets, liabilities and officers' names, were printed and carried in the newspapers.

FRANK E. BISHOP,
Attorney for Defendants Yates and Hamer.

46 And on the same day, April 1st, 1911, there was filed herein a certain Request of D. E. Thompson for Additional findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Request for Additional Findings.

Comes now defendant David E. Thompson before the rendition or entry of any judgment herein, and suggests to the Court that the findings and conclusions of law, as found, made and announced, touching the issues between plaintiff and this defendant, leave uncertain the particular grounds or facts upon which the Court concludes as a matter of law that the plaintiff is entitled to recover against this defendant. To the end, therefore, that the findings shall be made to disclose the particular ground of liability against this defendant, this defendant respectfully requests that the Court specially find further upon the following interrogatories:

1. Did this defendant ever at any time personally make, compile, issue or circulate any financial statement of the resources and liabilities of the Capital National Bank of an unofficial or voluntary character, separate and apart from the official reports which the Court finds this defendant attested of dates, respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891?

2. Did this defendant, so far as shown by the evidence
47 adduced, ever at any time personally direct or participate in making, compiling, issuing or circulating any financial statement of the resources and liabilities of the Capital National Bank, of an unofficial or voluntary character, separate and apart from the official reports which the Court finds this defendant attested of dates, respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891?

3. Is the liability of this defendant for deceit or false representations under the principles of the common law, as determined by the Court, founded or based upon the defendant's attestation of the official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, of dates respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891, or any one or more thereof?

4. What are the particular written false representations made by this defendant, which form the basis or foundation for the legal conclusion that this defendant is liable for deceit or false representations under the principles of the common law? This request is only for such general reference in the findings to said written statements as will identify them, specifically, or by classification in the proofs adduced at the trial.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

* * * * * * *

48 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Motion of Defendant David E. Thompson for Judgment in His Favor on the Special Findings.

Comes now the defendant David E. Thompson and suggests to the Court that the facts specially found by the Court herein, to-wit: that plaintiff was not induced or influenced by any oral statements of this defendant to deposit any funds in the Capital National Bank; and that this defendant had no actual personal knowledge of the falsity of any of the reports made to the comptroller of the Currency, attested by him, but in attesting such reports relied upon the statement made to him by the president and cashier of the bank (there being no evidence that this defendant ever made or participated in making or publishing any written reports other than the official reports so mentioned) leaves the judgment against this defendant wholly without support, and entitled this defendant to a judgment in his favor as a matter of law.

Wherefore, defendant moves the Court to vacate the judgment entered against him herein, and to render a final judgment upon the facts so specially found in favor of this defendant that he go hence without day, and for costs, in conformity to the law of the case as established and declared by the judgment of the Supreme Court of the United States, and the Supreme Court of Nebraska in the appellate proceedings heretofore had in said courts in this cause.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

49–51 On November 28th, 1910, the following order was had and entered of record herein, to-wit:

#1792.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHAS. E. YATES et al., Defendants.

On this day, this cause came on for trial and by agreement of parties in open Court, trial by jury is waived and this cause is set for further hearing, by agreement of parties in open court on January 30, 1911.

* * * * * * *

52 And now on this 1st day of April, 1911, being a day of the February 1911 term of this Court, these causes came on further to be heard on the motion of each of the plaintiffs for leave to amend their interlined amended petitions by interlineation upon consideration whereof said motions and each of them are sustained and the plaintiffs and each of them permitted to amend their petitions as prayed; to which ruling of the 53–60 Court the defendants and each of them except.

* * * * * * *

61 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, et al., Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates and Louisa P. Hamer administratrix defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

62 Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

Respecting the ninth request, as to the report of December 28, 1886 the Court answers the same in the negative and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line, and the residue thereof contained in sub-division "B" and answers the first question contained in sub-division "A" in the affirmative and the second question contained in sub-division "B" in the negative.

Subject to the foregoing Special Findings of Fact made at the

request of the defendants, the Court finds generally in plaintiff's favor and against the defendants and each of them upon the evidence under the issues joined, and that the allegations of plaintiff's amended petition are true, and that plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of $19,022.11.

To each of the findings of fact and conclusions of law made by the Court the defendants each severally except.

B. F. GOOD, *Judge.*

63 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, Administrator of the Estate of Ellis P. Hamer, Deceased, and DAVID THOMPSON, Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this First day of April, 1911, the Court in pursuance of the request of the defendant, David E. Thompson, in this cause, makes the following findings of fact, and conclusions of law:

In response to the first request the Court finds that the defendant Thompson failed to perform his duties as a director in the Capital National Bank, in failing to personally assist his fellow directors in managing and superintending the business of such bank and to examine the loans and securities thereof, and to see that the general condition of the bank corresponded with its Books and to see that only good Bills of Receivable were entered upon the bank's books and its statements, and to see that the assets which were worthless or of little value were charged off, and that the allegations of plaintiff's petition of official misfeasance and mismanagement are sustained by the evidence and that such allegations are true.

In respect to the second and third requests of the defendant David E. Thompson the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing, or responsibility of said bank to the plaintiff and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank.

64 In response to the fourth request the Court finds that the defendant Thompson attested only t-e five reports mentioned in said request.

Respecting the sixth and seventh requests of the defendant the Court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, at-

tested by him, but in attesting such reports the Court finds that the defendant relied upon the statements made to him by the president and cashier of the bank and without any investigation and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports and that the same were attested recklessly and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him, and in this respect the Court finds that the same were not made in good faith.

Subject to the foregoing Special Findings of Fact made at the request of the defendant David E. Thompson, the Court now finds generally in plaintiff's favor and against the defendant upon the evidence under the issues joined and that the allegations of the Plaintiff's Amended Petition are true.

Responsive to the request for a conclusion of law embodied in the first request the Court finds that Plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that plaintiff has sustained damages in the sum of $19,022.11.

To each of the findings of fact and conclusions of law made by the Court the defendant excepts.

B. F. GOOD, *Judge.*

* * * * * * *

65 Comes now the plaintiff and moves the court for leave to amend its last petition herein in this to-wit:—that it be permitted to amend its petition as follows, to-wit:

On page 2, line 37, after the words "to be" add the following words: "printed and."

On page 2, line 54, after the word "plaintiff" add the words "and sent by defendants and their agents to plaintiff through the U. S. mails and otherwise."

On page 2, line 60, after the word "advertisement" add the words "and the statements sent by defendants to plaintiff as aforesaid."

On page 2, line 62, after the word "advertisements" add the words "and the statements sent by defendants to plaintiff as aforesaid."

On page 3, line 72, after the word "made" add the words "and sent and delivered to plaintiff statements of its condition."

On page 3, line 74 after the word "published," add the words "and sent and gave to plaintiff."

66 On page 3, line 89, after the word "newspapers" add the words "and as aforesaid caused and permitted to be made and sent and delivered to plaintiff statements of the bank's condition."

On page 3, line 92, after the word "statements" add the words "and upon the statements of its financial condition, sent to and received by plaintiff as aforesaid."

On page 4, line 118, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be

sent and received by plaintiff said false and untrue statements aforesaid."

On page 4, line 129, after the word "Nebraska" add the words "and sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid."

On page 5, line 141, after the word "Nebraska" add the words "and sent and caused to be sent to, and received by, plaintiff said false statements aforesaid, through the U. S. mails and otherwise and which were received by plaintiff."

On page 5, line 148, after the word "published" where it appears the second time add the words "and sent and delivered to plaintiff."

On page 5, line 152, after the word "published" add the words "and as sent and delivered to, and received by, plaintiff."

On page 5, line 164, after the word "advertisements" add the words "and said statements of its financial condition so sent and received by plaintiff."

On page 6, line 168, after the word "advertisements" add the words "and other statemen-s as aforesaid."

On page 6, line 169, before the word "this," insert the words "and statements sent to plaintiff by defendants, and by plaintiff received and examined."

On page 6, line 207, after the word "statements" add the words "so sent to and received by plaintiff aforesaid," and after the word "advertisements" add the words "and statements."

67 On page 7, line 219, after the word "made" add the words "and said statements so sent to and received by plaintiff."

On page 7, line 224, after the word "statements" add the words "so sent to and received by plaintiff."

On page 7, line 233, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements."

On page 7, line 238, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff."

On page 7, line 240, after the word "published" add the words "and said statements so sent to and received by plaintiff."

On page 8, line 251, after the word "advertisements" add the words " and sending to and causing to be received by plaintiff said statements."

On page 8, line 254, omit the word "published."

BANK OF STAPLEHURST, NEBRASKA,
Plaintiff.

By J. J. THOMAS &
NORVAL BROS.,
It's Attorneys.

* * * * * * *

68 1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occuring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepts to said finding.

9. The court erred in finding on the third request that Charles E. Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

69 10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provisions of the banking act by any of the officers, agents or servants of the bank, and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be true, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were

untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B. of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the findings and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in each of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by this defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21*c*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National Banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such
72 Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowlecge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute- which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and wilfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgement of said United States Supreme Court on said writ of
73 error and the mandate of said Court on said judgement persuant to which these further proceedings are had in the following particulars:

(a) The findings and judgement violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources

and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting— (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report". (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgement of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in ever- state shall be bound thereby any-thing in the Constitution or laws of any state to the contrary notwithstanding." contained in section 2 article 6
74 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgement in his favor and moves the Court to render such judgement thereon.

29. Upon the facts specially found, this defendant is entitled to judgement in his favor and moves the Court to render such judgement thereon, notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The Court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements

or representations, either official or voluntary, were prepared,
75 distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

* * * * * * *

76 The defendant Louisa P. Hamer, Adm'x moves the court to set aside her findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

77 7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28/1886 and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

78 15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the

National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

79 20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16, and 17.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgement should be entered in his favor.

80 24. The conclusion and judgement that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking Law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgement and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action

of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute- which makes liability depend upon the fact that directors knowingly vio-
81 lated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars: (*a*) the findings and judgement violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting" (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional". And in each and every of these respects the Court has denied that due faith and credit to the judgement of the Su-
82 preme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding", contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to

judgement in his favor and moves the Court to render such judgement thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgement thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

83 35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published, advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant—on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this state.

FRANK E. BISHOP.
For Defendants.

* * * * * * *

84 The defendant, David E. Thompson, moves the Court to vacate and set aside the findings and judgment rendered herein against him and to grant a new trial of this case for the following reasons:

1. The said cause had been duly and regularly and lawfully removed to the Circuit Court of the United States for the District of Nebraska, by proceedings taken in accordance with the acts of Congress of the United States on the ground that the liabilities sought by plaintiff to be enforced arose on an act of Congress of the United States. As shown on the face of plaintiff's petition, this Court had no jurisdiction or power to proceed further in the trial of said cause.

2. The petition of the plaintiff does not set forth facts sufficient to constitute a cause of action in favor of plaintiff against this defendant, and does not set forth sufficient facts to support and maintain the judgment rendered herein.

3. The Court erred in receiving any testimony and in overruling the objection of this defendant to the admission of any testimony at the trial, because the petition did not state facts sufficient
85 to constitute a cause of action in favor of plaintiff against this defendant.

4. The judgment is not sustained by sufficient evidence.

5. The judgment is against the clear weight of the evidence.

6. The judgment is contrary to law.

7. The judgment is not sustained by the findings of the Court.

8. The facts specially found by the Court affirmatively show that defendant is not liable to plaintiff upon the cause of action set forth in the petition and entitle this defendant to judgment in his favor.

9. The Court erred in finding and holding as a conclusion of law that a mere negligence or failure of this defendant to perform his duties as a director in the Capital National Bank in failing to personally assist his fellow directors in managing and superintending the business of such bank and to examine the loans and securities and see that the general condition of the bank corresponded with its books and that only good bills receivable were entered upon the bank's books and its statements and to see that the assets that were worthless or of little value were charged off, and acts of mere official misfeasance and mismanagement, entitle plaintiff to recover in an action of deceit under the principles of the common law, exclusive of the requirements of the national banking act.

10. The conclusion of law found and held by the Court that plaintiff in its individual capacity and right is entitled to maintain or prosecute a cause of action for negligence or deceit under the principles of the common law on account of the mere negligence of this defendant in performing his duties as a director in the Capitol National Bank and for mere acts of official misfeasance and mismanagement, is contrary to and violative of the act of the Congress
86 of the United States known as the "National Banking Act," and the plan and theory of liquidation and distribution of the assets of insolvent national banks thereby established, in this that whereas by the said act of Congress all liabilities of directors of

national banks, for mere acts of official neglect, misfeasance and mismanagement are assets of the Banking Association and pass upon the bank's insolvency to the Receiver appointed by the Comptroller of the Currency, and are enforceable only by the Receiver so appointed, for the equal and ratable distribution and benefit of all creditors, the said conclusion of law and finding of the Court permits the plaintiff to recover in its personal and individual capacity to the exclusion of other creditors, and thereby operates to violate and nullify the act of Congress in that behalf, which is the Supreme and paramount law governing national Banks.

11. The court erred in finding, holding and adjudging that a common law action of deceit could be maintained against this defendant as a director of the Capitol National Bank, based upon his neglect of official duties imposed upon him by the provisions of the national banking act, or upon the manner in which this defendant conducted or failed to conduct the business of said bank, upon grounds exclusive and apart from the liabilities imposed in and by the terms of said act.

12. The Court erred in finding, holding and adjudging that the liability of this defendant upon the cause of action set forth in the petition is not governed and limited by the liabilities imposed upon directors of national banks by the national Banking act, being title 62 of the Revised Statutes of the United States.

13. The Court erred in finding, holding and adjudging as a matter of law, that this defendant is liable to plaintiff upon the cause of action set forth in its petition, notwithstanding that this defendant was without knowledge of the falsity of any report attested
87 by him and that he attested such reports in reliance upon information communicated to him by the president and cashier of the bank, under the principles of the common law exclusive of the requirements of the national banking act. The findings and judgment in that behalf are in violation of the provisions of section 5239 of the Revised Statutes of the United States, which makes liabilities of directors of national banks dependent upon the fact that they have knowingly violated or knowingly permitted the violation of the provisions of the national banking act and knowingly and wilfully participated in, and knowingly and wilfully assented to such violation.

14. The findings and judgment are contrary to and violative of the opinion of the Supreme Court of the United States delivered upon a writ of error to the Supreme Court of the State of Nebraska in appellate proceedings prosecuted from this Court in this same identical cause, and reported in volume 203 U. S. Supreme Court Reports at pages 158 to 181, inclusive, and also of the judgment entered by said United States Supreme Court on said writ of error, and also of the mandate of said court issued upon said judgment, pursuant to which these further proceedings were had, in the following particulars: (*a*) The findings and judgment are violative of the holding of said United States Supreme Court that section 5239 United States Revised Statutes, furnished the exclusive test of liability in actions against bank directors for deceit based upon false

official reports of the resources and liabilities of a national bank; (*b*) they are violative of the holding of said United States Supreme Court that a director of a national bank is not charged with knowledge of whether a report attested by him is true or false, as a matter of law, by reason of his official relation, or upon the theory that "it was his duty to know or refrain from acting"; (*c*) they are violative of the holding of said Supreme Court of the United States that liability of a director of a national bank for deceit does
88 not attach from the mere fact that a director "merely negligently participated in or assented to the making and publishing of an untrue official report"; (*d*) they are violative of the holding of said Supreme Court of the United States "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required: that is, that the violation must in effect be intentional."

And in each and every of the respects aforesaid, the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and by the acts of Congress passed pursuant thereto, and by the inherent necessity of according such faith and credit to all *ced*isions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding," contained in section 2, article 6 of the United States Constitution.

15. The specific findings of the Court that this defendant failed to discharge his duties of administration and was guilty of official misfeasance and mismanagement is not sustained by sufficient evidence and is not material to any issue upon which the liability of this defendant depends.

16. The special finding made in response to the fourth request of this defendant is not sustained by sufficient evidence, is not consistent with the findings made in response to the sixth and seventh requests of this defendant for special findings, and in view of the findings made in re-ponse to the sixth and seventh requests of this defendant, is mere surplussage and irrelevant and imma-
89 terial to any issue upon which liability of this defendant depends.

17. The general finding in favor of plaintiff is not sustained by sufficient evidence.

18. The conclusion of law made in response to the first request for special findings made by this defendant, namely: to find whether this defendant is liable on account of allegations of official misfeasance and mismanagement is erroneous and contrary to law.

19. Upon the evidence this defendant is entitled to judgment in his favor, as a matter of law.

20. Upon the facts specially found this defendant is entitled to a judgment in his favor, as a matter of law.

21. The damages awarded are excessive and greatly exceed the amount of damages sustained by plaintiff or established by any testimony.

22. The Court erred in including and allowing interest as an element of damages, and in compounding the interest, as is shown by the excessive damages assessed.

23. The action being in tort no interest is allowable or recoverable, and the maximum recovery can not lawfully exceed the unpaid principal sum of plaintiff's deposit in the Capitol National Bank.

24. The facts and conclusions of law found by the Court show that the judgment is based wholly or in part upon statements of the financial condition of the Capital National Bank "published in the newspapers." By the National Banking Act such newspaper publications of official reports were specifically required to be made, and were not voluntary or unofficial acts, and the findings of fact and conclusions of law stated in said judgment in so far as they find or assume such newspaper publications to be voluntary
90 and unofficial acts are in conflict with said act of Congress and with the law of the case established in and by the appellate proceedings heretofore had herein.

25. The additional special finding made in response to this defendant's request No. 1 for additional findings, except in so far as it finds in response to the interrogatory submitted that this defendant "did not personally make, compile, issue or circulate such statements other than those mentioned in said interrogatory" is not sustained by sufficient evidence nor by any evidence, and is contrary to the undisputed evidence.

26. The additional special finding made in response to this defendant's request No. 2 for additional findings, except in so far as it finds in response to the interrogatory submitted that this defendant "did not personally direct the making, compiling, issuing, or circulating, of any statements other than those referred to in said interrogatory" is not sustained by sufficient evidence, nor by any evidence and is contrary to the undisputed evidence.

27. The Court erred in its conclusion of law stated in answer to this defendant's 3rd request for additional findings. The conclusion of law found therein is so indefinite, uncertain and equivocal, in itself and by the references therein made to the answers given to the first and second interrogatories that the basis of the judgment cannot be ascertained therefrom.

28. The Court erred in each of its conclusions of law stated in answer to this defendant's 4th request for additional findings. In so far as it is therein found that defendant's common law liability rests "upon the statements * * * setting forth the financial condition of the bank which were published in the newspapers" it bases a common law liability upon official acts enjoined by the National Banking Act, contrary to and in violation of section 5239 of the Revised Statutes of the United States, and contrary to the law of the case established in and by the appellate proceedings here-
91 tofore had herein. The finding of facts contained therein is not sustained by sufficient evidence, nor by any evidence, and is contrary to the undisputed evidence.

29. The Court erred in finding generally in favor of plaintiff and against this defendant. The said general finding is also inconsistent with the facts specially found in favor of this defendant.

30. The facts specially found against this defendant on the Court's own motion are not sustained by sufficient evidence nor by any evidence and are contrary to the undisputed evidence.

31. The Court erred in overruling the motion of this defendant for judgment in his favor that he go hence without day, upon the facts specially found in his favor.

32. The Court erred in sustaining the motion of plaintiff to amend its petition and in granting leave to make such amendments after the conclusion of the trial.

33. The court committed errors of law during the trial which were duly excepted to by this defendant.

34. The Court erred in receiving incompetent evidence over the objections of defendant, and in giving consideration thereto in rendering judgment.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

* * * * * * *

92 BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

And now on this 8th day of May, 1911, it being the first day of the May, 1911, term of this Court this cause came on to be heard on the request of the defendants, for additional special findings filed herein, April 1st, 1911, and for final determination and the Court being fully advised in the premises in response to the request of the defendant, David E. Thompson, makes the following additional special findings of fact and conclusions of law.

Respecting interrogatory No. 1, the Court finds that the defendant, David E. Thompson, did not personally make, compile, issue or circulate such statements, other than those mentioned in said interrogatory, but that he knew financial statements of the resources and liabilities of the Capital National Bank of an official, as well as of an unofficial and voluntary character were being made, compiled, issued, published and circulated by the bank, from time to time, containing his name as one of the directors of said bank, and purporting and assuming to be made, compiled, issued, published and circulated, under his authority and directions as one of the directors of said bank, and that he knowingly permitted and assented to and allowed the same to be made, compiled, issued, circulated and published by the officers of the bank.

Respecting interrogatory No. 2, the Court finds that the defendant, David E. Thompson, did not personally direct the making, compiling, issuing or circulating of any financial statements other
93 than those referred to in said interrogatory but that he knew statements of the resources and liabilities of the Capital National Bank of an official as well as of an unofficial and voluntary

character were being made, compiled, issued, published, and circulated, by the bank, from time to time, and that he knowingly permitted, assented to and allowed the same to be made, issued, circulated, compiled and published by the officers of the Bank, and that he knew that said unofficial and voluntary statements and representations contained his name as one of the directors and purported and assumed to be made, compiled, issued, published, and circulated under his authority and direction as one of the directors of said bank.

Respecting the third interrogatory, the Court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit under the principles of the common law is not founded upon the attestation of the official reports referred to in the third interrogatory, but that such statements are corroborative of the unofficial and voluntary statements made by the bank, as set forth in the answers to the first and second additional interrogatories, and that such liability is founded upon the truth of the allegations of plaintiff's amended petition and embodied in the general findings of the Court.

In answer to the fourth interrogatory the Court bases or founds its legal conclusion as to the defendant, David E. Thompson's liability, upon the statements, representations and advertisements setting forth the financial condition of the bank which were published in the newspapers and such as were sent by the bank to the plaintiff, in the form of cards and slips, and purporting and assuming to have been made, compiled, issued, published, and circulated under the authority and direction of the directors of the Capital National Bank, and in the name of the defendant, David E. Thompson with the other directors, that such statements, representations and advertisements were false, and known to be so by the de-
94 fendant, and were relied upon by the plaintiffs to their damage.

And in response to the request of the defendants, Charles E. Yates, and Louisa P. Hamer, Administratrix, makes the following additional special findings of fact and conclusions of law:

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that such printed slips and business cards were compiled, prepared, and distributed by the bank, from time to time and contained his name as one of the directors, thereof, and purported and assumed to be compiled, prepared and distributed under the authority and directions of said defendant Yates and in his name as one of the directors of the bank.

Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates, did know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the Defendant Yates.

Respecting the 15th request, the Court finds that the said Ellis P. Hamer did know that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 16th request the Court finds that the said Ellis P. Hamer did not personally take part in the preparation or distribution of the printed slips or business cards, showing the assets and liabilities of the bank, as shown in the evidence but the Court
95 finds that he did know that such printed slips and business cards were prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name, as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

The Court further and upon its own motion finds as to each and all of the defendants, in this action that:—The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority, in their names and with their sanction and consent.

96–115 The Court further finds that the said Ellis P. Hamer and the defendants, Yates and Thompson, and each of them, from and after September 1891, had knowledge and knew said statements representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in fact false and untrue, as in Plaintiff's amended petition alleged, and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the Bank to be

in a sound solvent and prosperous financial condition when in fact it was at all times wholly insolvent and unable to pay its liabilities.

The Court further finds on all the issues, joined for the plaintiff and against the defendants and each of them and that the allegations of plaintiff's amended petition are true.

To all of which findings the defendants and each of them severally except.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover from the defendants and each of them the sum of $19022.11 Dollars, with seven (7) per cent interest thereon from April 1st, 1911 and costs of action taxed at — Dollars.

And thereupon and on the same day this cause came on further to be heard on the motions of the defendants for new trial and the Court being fully advised in the premises doth overrule the same to which the defendants and each of — except and are allowed Forty (40) days from the rising of the Court within which to prepare and serve bill of exceptions.

* * * * * * *

116 Supreme Court of Nebraska, September Term, A. D. 1911.
Nov. 10.

* * * * * * *

This cause coming on to be heard upon motion of appellee for an extension of time within which to serve and file answer briefs and for a continuance herein, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time to file briefs and for continuance be, and the same hereby is, sustained and appellee given until December 18, 1911, to serve and file answer briefs and supplemental abstracts, and cause is continued to the session of court commencing January 2, 1912.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 4th day of January, 1912, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

117 Supreme Court of Nebraska, January Term, A. D. 1912.
Jan. 4.

* * * * * * *

Upon agreement of counsel, it is by the court ordered that cause be and hereby is, continued to February 5, 1912.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 5th day of February, 1912, the following among other proceedings were had and done in said supreme court, to-wit:

The following causes were argued by counsel and submitted to the court:

* * * * * * *

17277.

BANK OF STAPLEHURST
vs.
YATES.

Appeal from Seward County.

* * * * * * *

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 22nd day of October, 1912, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

118 Supreme Court of Nebraska, September Term, A. D. 1912.
Oct. 22.

* * * * * * *

Upon application, it is by the court ordered that appellees in the above entitled causes be, and hereby are, given leave to serve and file reply briefs herein, instanter.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 31st day of January, 1913, there was rendered by said court and entered of record upon the journal thereof a certain Judgment in the words and figures following, to-wit:

119 Supreme Court of Nebraska, January Term, A. D. 1913.
Jan. 31.

* * * * * * *

This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein by them, taxed at $—, and have and recover from appellee all their costs so expended, that appellee pay all costs incurred herein by it, taxes at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

120 JONES NATIONAL BANK
v.
YATES.

BANK OF STATTLEHURST
v.
YATES.

UTICA BANK
v.
YATES.

BAILEY
v.
YATES.

Nos. 17276-7-8-9.

Opinion. Filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability cannot be measured by a higher standard than that which is imposed by the act.

2. Whereby the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the pen-
121 alty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and pre-

scribes a penalty for its non-performance "the rule prescribed in the statute is the exclusive test of liability." Yates v. Jones Nat Bank, 206 U. S. 158; Farmers & Merchants Nat. Bank v. Dearing, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of, or approved of, or participated in, the fraudulent acts of which complaint is made.

122 HAMER, *J.*:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed, Yates v. Jones Nat. Bank, 206 U. S. 158; Yates v. Utica Bank, Yates v. Bailey, and Yates v. Bank of Staplehurst, 206 U. S. 181, where it was held that plaintiff's petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiffs' causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments contain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

123

To the petitions thus amended each of the defendants demurred, the demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity

or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured
124 by the terms of that act, and not otherwise.

Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiffs' amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the supreme court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when defendants Yates and Hamer signed the
125 reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statement, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that they

knowingly participated in any of them. There being nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that
126 before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. That thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in Yates, v. Jones Nat. Bank, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an in-
127 ducement to him to act in that capacity the law assures him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in Yates v. Jones Nat. Bank, supra, is based on a simple proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is

the exclusive test of liability." In the argument on benalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute."
128 (Cochran v. United States, 157 U. S. 286.) The argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violations of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In Briggs v. Spaulding, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors, of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of
129 action together and then say to the defendant—If you are not liable upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of Briggs v. Spaulding, supra, where it was said: "Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other persons that he has a right to expect that the directors, who are sup-

posed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In Briggs v. Spaulding, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things,
130 said: (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of this course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 Marowetz, Private Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director) depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the
131 agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 Morawetz, Private Corporations, (2d ed.) sec. 551, et seq., and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. * * * (10) There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defend-

ants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defendants. It also is apparent that plaintiffs cannot
132 produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.
Sedgewick and Fawcett, J. J., dissenting.

133 LETTON, *J.*, concurring in part:

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the supreme court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the Supreme Court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The supreme court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." Yates v. Jones, Nat. Bank, 206 U. S., 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the supreme court of the United States. I am also inclined to the view that the evidence would support a judgment upon such
134 a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

135 And afterwards, to-wit, on the 10th day of March, 1913, there was filed in the office of the clerk of said supreme court, a certain Motion for Rehearing, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

* * * * * * *

The undersigned appellee, respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in Yates v. Jones Nat. Bank, 206 U. S., 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dismissal of this case and of erroneous construction as to the sufficiency of the evidence to support the findings and judgments of the trial court:

1.

It is said in the syllabus of this case, paragraph two, that "Where, by the federal statute concerning national banks, a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not * * * that
136 as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." Thomas v. Taylor, 32 Sup. Ct. 403.

2.

The deciding opinion in this case concedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decisions of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, in effect, denied a right and privilege conferred upon it by the constitution and statutes of the United States; of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas,
137 by decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with the opinion of the said United States Supreme Court, when in fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4.

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially §5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5.

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws,—"the rule of responsibility declared by them" have "been satisfied" (Thomas v. Taylor) and the judgment should be affirmed.

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6.

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and the measure of duty and of liability established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7.

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of liability announced by the Supreme Court of the United States in this

case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8.

It is said in the opinion of Judge Letton that:

"A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, shows that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking acts. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings
139 contained no federal question, and stated merely a common law liability. The Supreme Court of the United States held that a federal question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things exclusively governed by the specific provisions on the subject contained in that act. Yates v. Jones Nat. Bank, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S."

Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, nor that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirement of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e.
reports published pursuant to the call of the Comptroller
140 The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiff's petition

was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide and plaintiff's petition was then and now is sufficient to charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion, Judge Hamer says the plaintiff "still charge- the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery", whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts,—the only
141 requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says: "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank",—thus assuming that that court held the plaintiff's petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not so decide and plaintiff's petition does state a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew

of or personally participated in the acts of the officers of the bank of which they now complain it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District
142 Court should be reversed as to all the defendants". This statement assumes that our petitions failed to allege that the defendants personally knew of our personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and §5239 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally knew of or personally participated in the acts charged in the petition whereas the evidence is amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S.; that under the interpretation and construction of that statute made by the United States Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the
143 United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the frame of our petition precluded that view or theory; whereas, the holding of the United States Supreme Court is that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied for recovery upon any act done pursuant to an express command of the national bank act: also, that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the express commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act: and finally that that act does not require proof of actual knowledge but that it is sufficient if it be shown the defendants acted reck-

lessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages * * *." And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said
144 bank * * * or by the receiver * * *"—they thereby admitted they neglected their duties as such directors and committed the wrongs complained of in plaintiff's amended petition whereby the bank became insolvent and that such damages resulted from the conduct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and §5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

J. J. THOMAS,
Att'y for Appellee Bank of Staplehurst.

* * * * * * *

145–146 On application of attorneys for appellee, it is by the court ordered that time be, and hereby is extended to April 12, 1913, within which to file printed briefs in support of motion for rehearing heretofore filed herein.

M. B. REESE,
Chief Justice.

* * * * * * *

147 SEDGWICK, *J.* (dissenting):

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the Supreme Court of the United States that the action is one for deceit at common law and for that reason connot be maintained. The opinion says that it was held (by the Supreme Court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit," whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and

concludes that "unless the Supreme Court of the United States shall recede from its decision of these cases, the petition will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any member of the court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shown. "I concur in the view that the amendments made after the remand do not
148 change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the Supreme Court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly to anyone deceived," etc. Yates v. Jones Nat. Bank, 27 Sup. Ct. Rep. 638 (206 U. S. 158. This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusal to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. If proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action, and the right to bring it in the state courts is plainly stated in the fourth paragraph of the syllabus. "State courts
149 may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., Sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the Supreme Court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and de-

manded," and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the Supreme Court of the United States and has been since emphatically decided by that court, and no such claim can be made in this case. The question is whether these directors are liable under the federal statute, and this action
150 is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of Gerner v. Mosher, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. Yates v. Jones Nat. Bank, 74 Neb. 734. The Supreme Court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court upon this point that doubt has been emphatically been set at rest by a later decision where the language used by that court in this case is quoted and
151 its meaning fully stated and made plain. Thomas v. Taylor, 224 U. S. 73. That case originated in a nisi prius court of the state of New York. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the Supreme Court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank will not be reversed

when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y.) 53). The Supreme Court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment that "unless the Supreme Court of
152 the United States shall recede from its decision of these cases, the petitions will be held, insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such common law liability; that is, that no common law action could be sustained.

The case of Thomas v. Taylor, 224, U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, Yates v. Jones Nat. Bank, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional viola-
153 tion of a statute when one deliberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in Yates v. Jones Nat. Bank. The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of

the books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports were published as before, and the plaintiffs were deceived and
154 damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which this decision depends.

FAWCETT, J., concurs.

* * * * * * *

155 It is by the court ordered that oral argument on the motions of appellees for rehearing herein, be had before the court at the sesion of court commencing June 2, 1913.

M. B. REESE,
Chief Justice.

* * * * * * *

156 & 157 Upon agreement of counsel, oral argument on motions for rehearing in these causes, is continued to the session of court commencing September 16, 1913.

M. B. REESE,
Chief Justice."

* * * * * * *

158 This cause coming on to be heard upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore, ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed and a rehearing herein ordered.

J. FAWCETT,
Actin Chief Justice.

* * * * * * *

Hamer, Rose and Barnes, JJ. dissent from the order granting a rehearing herein and protest against the entry thereof on
159 the journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a

rehearing, the Chief Justice having been consulted by the plaintiff and having so announced when the cause was on for hearing. Shumway v. State, 82 Neb., 152, 165.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

Appellant, David E. Thompson, moves the Court to vacate, set aside and hold for naught, the order entered herein on January 7th, 1914, declaring carried the appellee's motion for a rehearing and granting a rehearing of this cause for the following reasons:

1. It appears upon the face of said order, and by facts of which the Court and all of its members have judicial knowledge, that the said order was not concurred in by a constitutional quorum of four judges qualified to act in said cause, and the said order is
160 for that reason null and void.

2. It appears upon the face of said order that of the six qualified judges of said Court, who sat upon the motion for a rehearing, and considered the record and arguments, only three judges, who are not sufficient to constitute a quorum or pronounce a decision according to section 2 of article 6 of the Constitution of Nebraska, concurred in said order.

3. It is shown by said order that of the six judges who were qualified to hear and determine said motion, and sat at the hearing, three voted against and three voted for a rehearing, and that the legal effect of said vote was an adherence by the Court to its own previous final judgment reversing the judgment of the district court and dismissing this defendant without day, as is well settled by the recent judgment of this Court in R. Mead Shumway vs. The State of Nebraska, wherein it was specifically adjudged that upon three judges voting for and three against a motion for a rehearing, the other judge having been of counsel and disqualified, the vote constituted an adherence by the court to its previous judgment affirming a capital sentence, and required the issuance by the clerk of a death warrant, under which plaintiff in error was hanged by the neck until he was dead.

4. Hon. M. B. Reese, Chief Justice, who, upon finding, as shown by said order, that the six qualified judges who heard said motion for a rehearing were equally divided in opinion thereon, and that said vote, in view of his own disqualification, operated as an adherence by the court to its previously entered final judgment, assumed the function of participating in said decision, concurring with the qualified judges who favored said motion, and directing the entry of said order, had previously been counselled by and an attorney of the parties in said case, namely the Jones National Bank, and was and is by the statutes of this State, in that behalf, disqualified and prohibited from acting as a judge or justice
161 in said case, or in any judicial proceedings therein, and his pretended judicial participation in said order is void and is of no force or effect whatever.

5. The disqualification of the Chief Justice to sit, or act or perform any judicial act or function in said case was within the judicial knowledge of the court and of all the members thereof, by reason of a public announcement made by the Chief Justice in open court in the presence of all of the members of the Court, upon the calling up of a motion to advance, that he had been counselled in the suit by one of the parties and was for that reason disqualified, and by reason of like announcements made in open court when an application made by appellees for additional time to file brief was called for hearing, when the case was first called for argument on its merits, and when the case was called for oral argument on the motion for a rehearing. Upon each and all of said occasions, the Chief Justice orally certified, publicly and in open court, to his own disqualification, and upon each and all of said occasions, he arose from his seat and left the bench and did not sit. The report of the opinions delivered on the occasion of the rendition of the final judgment of reversal by this court shows that the Chief Justice did not sit or participate therein.

6. This defendant did not, in person nor by attorney, orally or in writing, consent that the Chief Justice, act in this cause, and no mutual consent of the parties was ever made in writing and made part of the record in this case.

7. This defendant relied upon the nonparticipation of the Chief Justice on his own oral certificate, and on the fact that he left the bench when the motion was called, and had no notice or knowledge that he would, in any circumstances, participate in or
162 control the decision of said motion, and had, therefore, neither occasion or opportunity until after the event to formally challenge his competency and qualification to act in said cause, and had at all times implicity relied on his publicly expressed intention not to act therein.

II.

Motion of appellant, David E. Thompson, to vacate and set aside and hold for naught, the order entered herein of date May 17, 1913, ordering an oral argument on the motion for a rehearing.

And this appellant further and separately moves the court to vacate and set aside the order for an oral argument on the motion of appellees for a rehearing entered herein on the 17th day of May, 1913, for the following reasons:

1. The said order was not concurred in by four judges of this court, qualified to act herein as is required by section 2 of Article 6 of the Constitution of Nebraska.

2. The said order was made only by the participation and deciding vote of Hon. M. B. Ree-e, Chief Justice, who had previously been counselled — and an attorney of one of the parties therein, namely the appellee Jones National Bank, and was, for that reason disqualified to act in any judicial capacity therein, all of which is within the judicial knowledge of the court, and of each

one of the judges of said court. In the said proceeding, as is within the judicial knowledge of the court because it was a judicial proceeding of the court, there were but six judges qualified to act, and they were equally divided in opinon, three voting to deny an oral argument and to overrule the motion for a rehearing, and three voting for an oral orgument. The said vote was in law, and by the settled practice of this court an adherence to the previous final judgment of reversal, and operated to overrule said motion for a rehearing.

163 3. The participation of the Chief Justice in said proceeding and order was an unauthorized and void act, in direct violation of the statutes of this State in that behalf, and there was no consent of this appellant that the Chief Justice might act herein, *was* made in writing and entered of record in said case.

4. Upon at least three prior occasions when this case was called for hearing in open court, the Chief Justice orally certified, publicly, and in open court, to his disqualification to act herein, and upon each one of said occasions, he arose from his seat and left the bench, and did not return so long as the said case was under consideration of all of which the court has judicial knowledge because the same were a part of the public proceedings of the court. This appellant relied on the nonparticipation of the Chief Justice in the proceedings in said case upon his own public certification of his disqualification, and upon his said public announcement that he would not so participate, and upon his said retirement on every occasion when the case was called for public hearing, and had no knowledge that the Chief Justice had participated, or would, under any circumstances, participate in the private deliberation or orders of the court therein, contrary to his public announcement, until long after the event, and had therefore, neither occasion nor opportunity to file any formel recusation against the Chief Justice, or to prevent said issue for formal decision and determination.

III.

Motion of appellant, David E. Thompson, to correct the record and make the journal entries of the proceedings correctly recite the proceedings had by the Court herein, and to order a mandate to carry into effect its previous judgment of reversal and dismissed of this appellant without day.

And this appellant further and separately moves the court to correct the journal entry of the proceedings had herein on May 17,

1913, and on January 7th, 1914, severally, so as to conform

164 to and show the actual proceedings had and done by the Court, that is to say, that upon consideration of the motion for a rehearing, the Chief Justice was disqualified to act, and of the six qualified judges who participated therein, three judges voted to overrule said motion, and three judges voted to grant an oral argument on said motion, and that there not being a constitutional quorum of four qualified judges in favor either of granting said motion or of granting an oral argument thereon, the court does hereby

over rule the said motion, and adheres to its former judgment of reversal and dismissal, and directs the clerk to issue a mandate to carry into effect the said previous judgment.

The facts averred in the foregoing motions are proved by affidavits filed herewith.

JOHN F. STOUT.
HALLECK F. ROSE,
ARTHUR R. WELLS,
Attorneys for Appellant David E. Thompson.

* * * * * * *

Halleck F. Rose, being first duly sworn, on his oath says: I am now and for more than twenty-six years last past have been an attorney and counsellor at the bar of this court, in good standing. I have been a duly authorized attorney for appellant, David E. Thompson, in all the proceedings had in this court upon the appeal in cases numbered 17276 and 17277 in which the foregoing and annexed motions are made and filed. I have personally attended all of the public proceedings in this case upon said appeals as the attorney of appellan*d* David E. Thompson.

165 When the motion of appellants to advance said case was called for submission, and when a motion by appellees for an extension of time to file briefs was called for presentation, and when the said appeal was called for argument upon the merits, and when the said appeal was called for oral argument upon the motion of appellees for rehearing, Honorable Manoah B. Reese, Chief Justice was upon the bench. Upon each of said four several occasions, when public hearings were had before the Court in said cases, all of the judges of the said court were sitting upon the bench. Upon each of said several occasions, as soon as the said causes, numbered 17276 and 17277 were called, the Chief Justice announced publicly in open court from the bench that he had been counselled by one of the parties to said appeals in a previous stage of the proceedings and was disqualified to act in said cases, and he thereupon in each instance, following said announcement, arose from his seat upon the bench and retired through the door back of the bench into an adjoining room or chamber, and did not resume his seat upon the bench until a hearing in said several cases was concluded. I, therefore, say upon such creditable information, and belief, that the Chief Justice Honorable Manoah B. Reese, was at a former state of the proceedings in said cases counselled and employed as an attorney therein by one of the parties thereto, namely the Jones National Bank, appellee.

Appellant, David E. Thompson, never at any time, either in person, or by attorney, in writing, or otherwise, consented that the said Chief Justice might act in said cases notwithstanding his former employment as an attorney therein, and no mutual consent of the parties to said suits or to either one of them was ever made in writing and made part of the record in said cases, or in either one of the said cases.

After I was notified by the clerk of the entry of May 17th, 1913,

of an order of this court for an oral argument upon the mo-
166 tions of appellees for a rehearing, I discussed with my partner John F. Stout, the possibility that the Chief Justice, notwithstanding his former relation as counsel for one of the parties, might be impelled to act in the hearing and decision of the said motion for a rehearing and we had fully determined upon such conference that if he would not withdraw when the cases were called for oral argument as he had done on previous occasions, we would file a formal challenge against his qualification to act upon said appeals. The Chief Justice's public withdrawal when the cases were subsequently called, as above stated, left neither occasion, nor opportunity for making any formal challenge of his qualification to act in said cases, or for calling said issue to the notice of the court for decision. I relied confidingly and implicitly upon the said public certification of the Chief Justice of his own disqualification and had no knowledge, nor means of knowledge that he was acting, or would under any circumstances or conditions, participate or act in the decision or determination of the said motion from the public hearing of which he had withdrawn, until after the announcement upon January 7th, 1914, of the order sustaining said motion, a memorandum of which was delivered to the clerk upon said day by Judge Barnes, reciting that: "on consideration of said motion, Judges Barnes, Hamer and Rose voted against a rehearing and Judges Sedgewick, Letton and Fawcett voted for a rehearing, and thereupon Reese, Chief Justice, voted for a rehearing and declared the motion carried." Upon application this day to the clerk for a certified copy of the said order, he declined to make and certify the same upon the ground that while he had notified the parties of the order, the form in which it should be entered, had not yet been agreed upon, and that he was unable to certify the form of the order or to enter an order upon the journal until the court had prepared and agreed upon its specific terms.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 8th day of January, 1914.

[SEAL.]

K. M. ANDERSEN,
Notary Public.

167 STATE OF NEBRASKA,
County of Douglas, ss:

John F. Stout, being first duly sworn, on his oath says: I am attorney and counsellor at the bar of this court, and have been for many years last past, in good standing. I am associated as a partner with Halleck F. Rose, and was so associated when the appeals in cases numbered 17276 and 17277, in which the foregoing motions are made, were filed and docketed in this court. Our said firm has represented appellant, David E. Thompson, in all of the proceedings had in said cases on said appeals in this court. On the occasion of the original argument of said cases on the merits before this court, I was in attendance upon the court and participated in the presentation of a motion in another case heard at the morning

hour. When the above mentioned causes were called upon that occasion for final argument, all of the judges of this court, including the Chief Justice, were upon the bench. When said causes were so called for argument, the Chief Justice, Honorable Manoah B. Reese, announced publicly and in open court that he had been counselled by one of the parties in said cases at a former stage of the proceedings and was disqualified; and the Chief Justice thereupon arose from his seat upon the bench and left the bench, retiring through a door back of the bench into an adjoining room or chamber, and thereupon the argument of the said causes proceeded in the absence of the said Chief Justice.

After the making of a previous order for an oral argument in said causes in this court, my partner, Halleck F. Rose, and myself conferred as to what course we should pursue in the event the Chief Justice should not retire on his own motion when the said cases were called for oral argument upon the motions of appellees for a rehearing. We then determined that if the Chief Justice
168 should not so retire, as he had previously done, we would present a formal challenge to his qualification to act in said cases. I was personally in the office of the clerk of the Supreme Court on the afternoon of January 7th, 1914, when Judge Barnes delivered to the clerk a memorandum of the order that day made by the court granting a rehearing in the aforesaid two cases, and I asked and was given permission to read and copy the same. The said order recited that: "on consideration of said motion, Judges Barnes, Hamer and Rose voted against a rehearing, and Judges Sedgewick, Letton and Fawcett voted for a rehearing, and thereupon Reese, Chief Justice, voted for a rehearing and declared the motion carried." I also read a memorandum by Judges Barnes, Hamer and Rose, which was at the same time delievered by Judge Barnes to the clerk. I did not take a copy of the said memorandum, but it stated in substance that the said three judges dissented from or protested against the entry of the order for a rehearing, because the said order was not concurred in by a qualified constitutional quorum of the court. The said memorandum disclosed that Mr. Chief Justice Reese had participated in the said order and declared the motion for rehearing to be carried.

I had no knowledge until the said 7th day of January, 1914 that the Chief Justice was participating or acting in said case, or would do so under any circumstances, contrary to his public announcement in open court; and the attorneys for appellant, David E. Thompson, had neither previous knowledge, nor occasion, nor opportunity to raise the issue of the qualification of Chief Justice, or to have the same determined previously by a constitutional quorum of the court. The said attorneys relied upon the public announcement made by the Chief Justice, and for that reason presented no challenge against his qualification.

JOHN F. STOUT.

169 Subscribed in my presence and sworn to before me this 8th day of January, 1914.

[SEAL.] K. M. ANDERSEN,
Notary Public.

STATE OF NEBRASKA,
Lancaster County, ss:

David E. Thompson, being first duly sworn, on his oath deposes and says: I am one of the appellants in cases numbered 17276 and 17277, and am the party who makes the foregoing annexed motions. I was personally before the Supreme Court in September, 1913, on the occasion of the oral argument of the motions of appellees for a rehearing in said two cases. When the cases were reached and called, all of the judges, including the Chief Justice, were upon the bench. Upon the cases being so called for oral argument, the Chief Justice, Honorable Manoah B. Reese, stated publicly and in open court that he had at one time been counselled by one of the parties in said cases and was disqualified to act therein, and he thereupon arose from his seat and left the bench, retiring through a door at the back of the bench into an adjoining room or chamber, and he did not again return to the bench until the oral arguments in said causes had been concluded. A considerable number of persons were in the audience in the court room when said public announcement was so made.

I did not at any time, in any manner, in person or by attorney, consent that the Chief Justice should act in said causes, or in either one of them, and no mutual consent of the parties to said causes or either one of them was ever made in writing and made part of the record in said cases, or either one of them. I had no knowledge, or means of information, until announcement of the order granting the rehearing of said cases, on January 7th, 1914, which I
170–172 was informed, showed that the Chief Justice participated therein and cast the deciding vote for a rehearing, that he had in any respect acted or participated in the said motion for a rehearing, or that he intended to, or would under any circumstances, so act or participate in the decision of the said motion, contrary to his own public announcement made in my presence on the occasion of the oral argument on said motion. I would have insisted on my attorneys presenting a challenge against the qualification of the Chief Justice to act in said cases if I had previously known, or been informed, that it was his purpose to do so. As a suitor before this court I feel and say, that because of the participation of the Chief Justice in the circumstances stated, I have not had a fair hearing and decision of the motion of appellees for a rehearing in said cases, and that the said Chief Justice was, and is, biased in favor of the appellees with one of whom he had been in previous consultation as an attorney in respect to the said identical cases, and in whose favor he voted when acting upon the said motions for rehearing.

DAVID E. THOMPSON.

* * * * * * *

173 The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for naught so much of the record and proceedings of January 7, 1914 as shows the motion for rehearing was declared carried and orders

a rehearing to be had for the reasons which follow this and the other two motions.

2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to correct the proceedings and order of the court of May 17, 1913 ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased each separately moves the court to correct the proceedings and order of the court of January 7, 1914 so as to eliminate therefrom the deciding
174 vote of the Chief Justice, the Honorable Manoah B. Reese from said order and proceedings and from the tie vote of the remaining six judges who heard and considered this case to overrule the motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court *to execute and carry into effect the former judgment of this court* of January 31, 1913 reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of the Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as such—in any case—where he has been attorney for either party in the action or proceeding", without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides,—"The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision,"
175 and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914 and by the showing filed herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges

who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practice of this court and courts in general, had the legal effect of overruling the motion for rehearing and of adhering to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action and of dismissing these appellants without day, which rule was illustrated and applied in Shumway vs. State, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated, in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

176 7. The order of May 17, 1913 directing re-argument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

8. The order of May 17, 1913 was as the appellants believe carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants, either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914 and there was no opportunity or occasion so far as the appellants personally or by counsel know, to challenge or object to such action of the Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914 allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerk of the court with the exception that it should not recite "Was argued by counsel", and after reciting the vote of the six judges, should read,—"And thereupon, upon due consideration whereof the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to

execute and carry into effect the prior judgment of t-is court as
177 directed in the majority opinion therein."

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

* * * * * * *

178 Frank E. Bishop being first sworn on his oath, says: I am a regularly admitted attorney at the bar of this court in good standing for the last twenty years and as such I have personally appeared and participated in all of the public and open proceedings of this court in the above entitled cases as the sole attorney for the appellants Charles E. Yates and Louisa P. Hamer, as Administratrix of the estate of Ellis P. Hamer, deceased, from the time the cases were filed in this court on appeal, to the present time.

On the first occasion when these cases appeared before this court upon the present appeal on motions of said appellants to advance the cases for an early hearing on the ground that they had once before been appealed to and passed upon by this court, the Honorable Chief Justice, Manoah B. Reese was presiding, and all of the judges now constituting the Supreme Court were then present and acting and the court was in open session with the chief justice calling the list of motions to be presented to the court. When these cases were reached and their names announced, the chief justice from his seat on the bench announced openly, in the presence of the court that he was not competent and was disqualified to sit and participate in the proceedings and determination of the records and judgment in these cases, because before he was elected to this court he had been consulted and had acted as attorney for at least one of the plaintiffs in these cases and that in more than one consultation with Mr.
Harry Jones a chief officer of the Jones National Bank, an
179 appellee herein, he had been fully advised of the facts and circumstances from the plaintiff's standpoint in these cases and had expressed his opinion of the law and the facts therein, and that he might not be a fair and impartial judge to try the cases, and was disqualified under -he law to sit or participate in them. Immediately thereupon the chief justice retired from his seat at the bench and withdrew from the court into an adjoining room and did not appear or take part in the public presentation of the motions to advance, but left the proceeding — charge of the presiding Judge Hon. C. B. Letton. Subsequently when a motion of the appellees was made for longer time to prepare and file their briefs, the chief justice was again upon the bench and when the motion was read, he likewise referred to his disqualification, retired from the bench and withdrew from the court. When the cases were reached for argument upon the merit of the appeals and subsequently when counsel appeared by virtue of the order of the court to argue motion of the appellees for a rehearing the chief justice was upon the bench, again referred to his disqualification, retired and withdrew from the court, and so far as I or either of the appellants I represent have known the chief justice has not sat or participated in any of the public proceedings or

hearings of the court in these cases, nor in any of the private consultations of the court in any matter connected with these cases until his action in casting the deciding vote allowing a re-hearing in these cases appeared in the order presented for extension upon the record of this court on January 7, 1914 and in the dissenting opinion of Judges Barnes, Hamer and Rose against the allowance and entry of said order for rehearing. In each instance of the re'irement of the chief justice from the bench in these cases, the court and counsel for the parties acquiesced in and assented to such action without protest or objection. Although on several such occasions and
180 to the best of my recollection upon the first occasion the said Mr. Harry Jones was present in the court and his counsel was present on every such occasion and I therefore state from such information and believe that the chief justice was counselled in and acted as attorney for at least one of the plaintiffs in these actions the Jones National Bank, and is therefore disqualified from acting as Judge in any of the matters or proceedings of the court in these cases.

Sometime during the month of February, 1911, on or before the time of the trial of these actions in the District Court of Seward County, which lasted for nearly that whole month, but the exact date I cannot state, Mr. Harry Jones in my presence, in substance said that the four cases above named were being prosecuted by the plaintiffs in common, that the money obtained upon the judgment against the defendant A. P. S. Stuart had been used first to pay attorneys' fees and costs and expenses of the plaintiffs in common and the net proceeds applied to their claims in the four cases in common, as would also be the recovery in these cases if it was realized and that he was acting as the representatives of all of the plaintiffs in this litigation. So that when the chief justice counselled with Mr. Harry Jones, he was in fact counselling with regard to each one of the plaintiffs. Neither of the appellants Charles E. Yates, or Louisa P. Hamer, or myself ever consented in writing or otherwise that the chief justice might act on any proceeding or matter in these actions as judge or otherwise, notwithstanding his employment as such attorney and his own statement of his disqualification.

The order of May 17, 1913, for an argument on the motion of appellees for rehearing, does not disclose the vote of any judge thereon, but when six judges heard the case and two dissented it appeared that the chief justice may have voted on that order,
181–183 and in consultation with counsel for the other appellant, Mr. D. E. Thompson, I was prepared to file a formal challenge against his right to participate in that hearing if necessary, but upon the hearing, the chief justice withdrew as he had on every other occasion which gave no opportunity nor reason for presenting any such protest. I then supposed and relied upon the fact that he had not voted nor participated in ordering the argument of the motion for re-hearing and confidently expected that he would not participate in or act upon any of the proceedings or matters, before the court in these actions and had no knowledge that he had done so until the filing of the dissenting opinions and the recitation of the

proposed order allowing a rehearing on January 7, 1914 which tentative order recites that three of the six judges voted for and three against allowing a rehearing, and "thereupon chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried."

Under these circumstances and in consideration of the fact that the appellant Charles E. Yates is far advanced in years is in ill health and is at present at some point in the state of Florida, and that the appellant Louisa P. Hamer is well advanced in years and is not acquainted with judicial procedure and could hardly intelligently make affidavit in this matter, I am compelled to the belief that they cannot have a fair and impartial trial of their rights in these cases as required by law, where the action of the court is determined by or participated in by the chief justice on account of possible prejudice and the certain disqualification arising from his having been consulted as attorney for the plaintiffs.

FRANK E. BISHOP.

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184 REESE, *C. J.*:

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form if in court I withdrew, if in the consultation room I kept silent. I was acting in entire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case, I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing, Judges Barnes, Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemenly and personally friendly way. I stated that the vote would not be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer, at a meeting of the State Bar Association at Omaha, a long time member of the Iowa Supreme court and former Chief Justice thereof, and in whose integrity and ability,

I, with all others so far as I know, have the fullest confidence,
185 and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a

matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation, he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are qually divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is, in effect, rendered by the three, while the constitution and statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into which I did fall. It is true that I stated from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

186 At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward, applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure, perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said something about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years

after the bank failure, by other attorneys. I was never at any time consulted by Mr. Jones nor his counsel as to the bringing or maintaining of this suit—never employed as attorney or counselor and have known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know, I never knew any of the plaintiffs nor officers of the other banks, nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, as above stated.

* * * * * * *

187 Lionel C. Burr, being first duly sworn on his oath deposes and says as follows: Several months after the failure of the Capital National Bank in January 1893, the firm of Pound & Burr was employed as attorneys in these several cases and especially by Thomas Bailey Appellee, in No. 17279, who is now absent from this state at Corpus Christi, Texas, where an affidavit has been sent by mail to him and where he has been for a period of about two years. I was at all times familiar and knew about all the pleadings filed, briefs prepared and of the several trials in both State and Federal courts; I knew all the counsel employed in the case; I never heard it claimed that the Honorable Menoah B. Reese, now Chief Justice of this court *as* being either attorney, counsellor or -dvisor in any of these cases until within the past few months, and I am sure he never was. I occupied such a position in these cases, that it had *had* been consulted, retained or counseled in any of the proceedings in these several cases I am sure I would have heard it and would have had knowledge of that fact. I know he was never employed counseled or retained by Thomas Baily.

Further affiant saith not.

* * * * * * *

188 & 189 STATE OF NEBRASKA,
Seward County, ss:

Fritz Becord, being first duly sworn, upon his oath says he is a resident of Utica, Seward county, Nebr., and that ever since the 1st day of January, 1893, he has been the president and managing officer of the Utica Bank, of Utica, Nebr., the plaintiff in the above cause entitled Utica Bank, Appellee, vs. Charles E. Yates et al., Appellants, which cause is now pending in the Supreme Court of the State of Nebraska.

Affiant further says that he is not personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska; that he never at any time talked with, consulted or in any way or manner, made any statement of any kind or nature whatsoever, to him, the said Manoah B. Reese, about said cause, or in relation to the issues therein, nor has he at any time, in any way or manner, either directly or indirectly, talked to, conversed with, or consulted him, regarding said cause, nor has he, or any officer, member or stockholder in said bank, directly or indirectly authorized any person or persons to talk to, consult or converse with

him, regarding said cause, or in regard to any cause now pending or heretofore pending in said court.

Affiant further says that one Harry T. Jones, of Seward, Nebr., who was an officer of the Jones National Bank of Seward, Nebr., and with whom affiant is well and personally acquainted, was never at any time authorized, requested, selected or permitted, in any way or manner, to represent the Utica Bank aforesaid, in the conduct or management of said Utica Bank's cause of action, and that the cause of action of the said Utica Bank has at all times been, since the commencement of the same, in charge and under the management and control of this affiant, and the attorneys of record in said
190 cause for the said Utica Bank.

Affiant further says that the said Manoah B. Reese, Chief Justice of said Supreme Court, was never at any time, either directly or indirectly, employed by the Utica Bank as its attorney in said cause, or otherwise, and that the said Chief Justice, Manoah B. Reese, never at any time acted, or attempted to act, for the Utica Bank in said cause, as its attorney, or otherwise, nor has he the said Manoah B. Reese, at any time ever acted for the said Utica Bank in said cause, as its attorney, in any cause or matter whatsoever; and affiant further says that the said Chief Justice, Manoah B. Reese, has no acquaintance, either personal, professional, or otherwise, with the Utica Bank, the plaintiff and appellee aforesaid, and that he has never spoken to this affiant, or to any officer or agent of the said Utica Bank, upon any subject or matter whatever, with relation to said action or otherwise; and further affiant sayeth not.

FRITZ BECKORD.

* * * * * * *

191 H. T. Jones being first duly sworn deposes and says as follows:

At the time of the failure of the Capital National Bank in January, 1893, my father, Claudius Jones was President of the Jones National Bank, Appellee in the above entitled cause, and I was its Cashier but in fact had the entire management of the bank as I had had for some years prior thereto. I became its President on or about January 1894.

The Capital National Bank of Lincoln, Nebraska, closed on January 21, 1893 at 1 o'clock P. M. and thereafter did not open
192 again. During the afternoon of that day, the Jones National Bank had mailed certain remittances to the Capital National Bank.

I do not think I learned of the failure until Monday morning, January 23, 1893—just a short time before the train departed for Lincoln. I took the first train and came to Lincoln for the purpose of preventing the remittance above referred to from entering into the assets of the Capital National Bank. On arriving at Lincoln, I called on the Honorable Manoah B. Reese, now Chief Justice, whom I had previously known for some time and asked him to assist me in procuring the return of the remittances.

It is my recollection that I accompanied the Chief Justice to the

bank and it was there arranged with the Bank Examiner in charge, that all remittances received by the bank after it closed its doors on the Saturday preceding, should be returned, as was done with all similar remittances sent by other banks.

I do not recall all the conversation between the Chief Justice and myself at that time but I am certain that he was not then or at any other time consulted with reference to any suit against the directors or officers of the Capital National Bank. The Chief Justice made no charge for his services and neither I nor the Jones National Bank paid him any fee or gave him any reward either at that time or at any other time.

I had no thought of instituting suit against the directors or officers of the Capital National Bank for I did not then consider the bank's failure to be serious or that the Jones National Bank would suffer any loss thereby. In fact I did not know that such an action would lie against the officers and directors and did not learn that such an action was possible until several months thereafter.

193 Edward C. Biggs and J. J. Thomas, attorneys at Seward, were the attorneys for the Jones National Bank at the time of the failure of the Capital National Bank but I did not have time to consult them before departing for Lincoln.

At the time of my conversation with the Chief Justice, it was not known that there had been any irregularities in the management of the Capital National Bank. These were not discovered until some time thereafter and it was several months after my visit to Lincoln before the matter of instituting suit against the officers and directors personally was discussed with my said attorneys at Seward.

The transaction above related is the only one in which the Chief Justice had anything to do with any matter growing out of the failure of the Capital National Bank so far as it, in any way directly or indirectly, affected the Jones National Bank.

I did not then nor at any other time, nor did any one else on behalf of the Jones National Bank ever counsel with the Chief Justice with reference to the commencement of this or any other suit against the officers or directors of the Capital National Bank nor was he ever retained or counselled either in this suit or any other suit by myself or the Jones National Bank or any one in its behalf. In fact he was never counselled by me or by any one on behalf of the Jones National Bank at any time after January 23, 1893 either in this matter or in any matter concerning either myself or the Jones National Bank, nor was he ever counselled by me on behalf of any of the other appellees herein.

I think I have been present at every public hearing in this Court in these cases. I think at the first hearing when the Chief Justice retired he made some remark but I can not now recall his words.

194 At all subsequent public hearings, while he retired from the bench, I am quite sure he made no remarks as to why he did so and it is my memory that upon one occasion the Court had taken an intermission immediately preceding the time these cases were reached for argument and that when the members of the

Court reassembled to hear these cases the Chief Justice did not return.

I am quite sure that the Chief Justice never stated at any time that he had acted as attorney for at least one of the parties in these cases or that in more than one consultation with affiant the Chief Justice had been fully advised of the facts and circumstances from the plaintiff's standpoint in these cases or that he had expressed his opinion of the law and the facts herein or that he might not be a fair and impartial Judge to try the cases or that he used any words of like import.

I have read the affidavit of Frank E. Bishop filed herein wherein he refers to a statement made by me during the month of February, 1911, and said statement is untrue and incorrect. The fact is that I never represented any of the appellees except the Jones National Bank and never counselled with the Chief Justice concerning them.

Some time after the commencement of these actions these appellees each obtained judgments against A. P. S. Stuart who was then a defendant therein. Thereafter executions issued in each of said cases and were levied on the property of the defendant Stuart. The executions were all levied at the same time so that they became co-ordinate liens. Upon sale under said executions there were no outside bidders for a portion of the property sold and it was bid in by me on behalf of the several plaintiffs for convenience in subsequently disposing of the same. When the property was thereafter sold the proceeds were prorated among the various plaintiffs in ac-
195 cordance with the amount of their several judgments. I merely held the property as trustee for the plaintiffs. I never stated nor is it true that there was any agreement or understanding that these four cases were to be or being prosecuted by the plaintiffs in common nor that the net proceeds were to be applied on plaintiffs' claims in common. The appellant David E. Thompson is a defendant only in the case of the Bank of Staplehurst and the Jones National Bank and any recovery against him could not be applied on the judgments in the other cases and there is no agreement or understanding that the same shall be so applied and never has been.

These cases were tried together pursuant to a stipulation of all the parties in order to save expense and time in litigation and because the greater portion of the evidence in each case is relevant and material to each of the other cases.

Dated this 17th day of January, 1914.

H. T. JONES.

* * * * * * *

196 STATE OF NEBRASKA,
Seward County, ss:

I, Erich Jacobs, being first duly sworn depose and say that I am the President of the Bank of Staplehurst, Appellee in the above entitled cause of the Bank of Staplehurst, Appellee, vs. Charles E. Yates et al., Appellants, No. 17277, and that I have been President

ereof since February 1st, 1894; that prior thereto and from Febru-
ry 10, 1886 to said February 1, 1894, I was Cashier of said bank.
At the time of the failure of the Capital National Bank of Lincoln
ebraska, I was in charge of the affairs of the Bank of Staplehurst
nd from that time on until this date, I have had sole charge and
anagement of its claim against the Capital National Bank and
gainst the appellants herein and have attended to all matters con-
rning said Bank of Staplehurst in all its litigation growing out of
e failure of the Capital National Bank.
I am not personally acquainted with Honorable Manoah B. Reese,
hief Justice of the Supreme Court of Nebraska. I have never met
im or counselled with him or employed him as attorney in any
atter either for my-self or for the Bank of Staplehurst and I know
at he has never at any time been counselled or employed as coun-
l or attorney on behalf of the Appellee, Bank of Staplehurst either
this case or in any other matter whatsoever.
So far as I know, I have never seen the Chief Justice and do not
ink I would know him if I were to meet him.
I further say that no other person whomsoever has ever directly or
directly counselled, talked to or conferred with the said Chief Jus-
e on behalf of the Bank of Staplehurst in the above entitled cause
or in any other matter whatsoever.
As above stated, I have had full and complete charge of
this case on behalf of the Bank of Staplehurst and am positive
at H. T. Jones of Seward, Nebraska was never authorized by said
nk or by any one on its behalf to represent said Bank in the con-
ct or management of this cause and that he never did so represent
is Appellee in any matters concerning this case or any other mat-
and so far as affiant is aware, he never did counsel or consult with
Chief Justice on Appellee's behalf.
There never was any agreement or understanding between the
nk of Staplehurst and the other appellees that these four cases
ould be prosecuted by the plaintiffs in common nor that the pro-
ds were to be applied on plaintiffs' claims in common. The
pellant David E. Thompson is a defendant only in the cases of
Jones National Bank and the Bank of Staplehurst and any re-
very against him could only be applied on the judgments in those
es and there is no agreement and understanding that the same
all be applied otherwise and there never has been. These cases
re tried together pursuant to a stipulation of all the parties in
der to save expense and time in litigation and because the greater
rtion of the evidence in each case is relevant and material to each
the other cases.
Dated this 16 day of January, 1914.

ERICH JACOBS.

* * * * * * *

Halleck F. Rose, being first duly sworn, on his oath deposes
and says:
I am attorney for appellant David E. Thompson, in the above-
itled cause, whose testimony by affidavit was filed herein with the

motions referred to in the caption hereof. I have read the statement of the Chief Justice, filed herein on the 14th day of January, 1914, subsequent to the filing of the said motions and of my said affidavit in support thereof. The above-entitled cases, in one of which the Jones National Bank is plaintiff, and in one of which the Bank of Staplehurst, is plaintiff, and cases No. 17,278, in which the Utica Bank is plaintiff, and No. 17,279, in which Thomas
199 Bailey is plaintiff, and in the latter two of which David E. Thompson was not a party, were by written stipulation of all of the parties to all of said cases tried together and heard upon the same identical evidence in the District Court of Seward County. The questions involved in all of the cases have always been regarded by all counsel concerned and by all courts in which the causes have been considered, as identical, and the same were in this court and on former writs of error in the Supreme Court of the United States, and upon the present appeals in this court, disposed of in the main by opinions applicable to all the cases. H. T. Jones was for a long time during the pendency of said cases the president of the Jones National Bank. While said Jones was so president of said Bank and as such actively participating and in effect directing the litigation in all of the cases above mentioned, he told me that there was an arrangement between the plaintiffs whereby all sums that had been or would be realized in and by the prosecution of said suits was and would be a common fund for distribution among the plaintiffs in proportion to the amounts which they severally had on deposit in the Capitol National Bank on the date of its failure, and, as he expressed it, whatever was gotten out of the suits was to go into a "pot" and that said Jones was, in a way, appointed and looked to to conduct and manage the suit and the funds and that one division had been made from funds derived from judgments previously recovered against Ambrose P. S. Stuart in the identical suits here and now pending on appeal. I therefore say on oath, upon such information and belief, that the Jones National Bank has a pecuniary interest in the result and avails of each one of the judgments in every one of the said mentioned four suits.

I am informed and am personally familiar with the history of all the litigation that has been prosecuted by the four several
200 plaintiffs hereinabove named against the appellants therein and others, since the failure of the said Capitol National Bank, on January 21, 1893.

On or about the 27th day of October, 1893, as is set forth in the answer of defendant Thompson in case No. 17,278, the Jones National Bank sued the defendants herein in the District Court of Lancaster County, Nebraska on substantially the same cause of action that is set forth in its present amended petition herein, and the object and prayer of said suit was to enforce personal liability against the said defendants for the loss of the previous deposits of the said Jones National Bank in the Capitol National Bank of Lincoln, Nebr.

Subsequently, and without any final judgment having been entered therein, the said suit was dismissed on the motion of the said Jones National Bank and thereupon, on February 25, 1895,

the present suit was brought for the same identical purpose and end. The petition of the said Jones National Bank, embraced in the transcript in case No 17,276, sets forth the plaintiff's previous deposit in the Capitol National Bank, for the loss of which it seeks to recover, in the words following:

"That on the 2nd day of January, 1893, plaintiff had a balance to its credit amounting to Ten Thousand Four Hundred Twenty-nine and 90-100 ($10,429.90) Dollars, money it loaned to and deposited with said Bank, and from January 2nd, 1893, to and including Jany. 21st, 1893 (the day said Bank closed its doors and ceased to do business) the plaintiff loaned and deposited with said Bank the following sums of money, to-wit:

"January	4, 1893	$5660/60
"	6, "	233.35
"	7, "	250.84
"	10, "	254.40
"	13 "	301.57

201

"January	16, 1893	162.15
"	19, "	5000.00
"	20, "	400.79
Balance due plaintiff on January 1st, 1893		10429.90
"Making total amount due plaintiff from Capital National Bank		22793.11

"That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $5,263.88, leaving still due and owing from said Capital National Bank to the plaintiff the sum of Seventeen Thousand Five Hundred Twenty-nine and 23-100 ($17,529.23) Dollars, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated."

In the previous performance of service as attorney for appellant D. E. Thompson, in the conduct of two trials of the present suits, I ascertained and state the fact to be that Mr. H. T. Jones was not personal depositor in the Capitol National Bank, and I therefore suggest and say that the reference in the statement filed herein by the Chief Justice, to Mr. Jones having consulted the Chief Justice after the failure of the Bank "about bringing a suit for his previous deposits in the bank" is an error and that the said conversations must have related to the deposits of the "Jones National Bank of Seward", whose remittances, delivered at or just subsequent to the failure of the bank, the Chief Justice assisted in procuring the return of; and in which bank the said Jones was at the time the managing officer.

Upon my information and definite knowledge of the transactions of the Jones National Bank with the Capitol National Bank, prior to January 21, 1893, and my knowledge that H. T. Jones was not a personal depositor in said bank, obtained while serving and conduct-

ing the defense of said cases, as aforesaid, and as shown
202 & 203 by the pleadings and evidence in the record herein, I say, on oath, that the Chief Justice was not mistaken and could not have been mistaken upon the several occasions when from the bench in open court, he announced his disqualification to act in the said several cases, and he was not then mistaken "in supposing that this suit was based upon the matter spoken of by Mr. Jones" to him after the failure of the Capitol National Bank. The suit of said Jones National Bank is in fact based upon the loss of the previous deposits of the bank in the Capitol National Bank, about the bringing of a suit for which the Chief Justice in said statement affirms Mr. Jones consulted him and about which Mr. Jones drew the advice and opinion of the Chief Justice.

My recollection of the substance of the oral statement of the Chief Justice, made from the bench at the time he first announced his disqualification in said cases, concurs with the recital thereof contained in the affidavit of Frank E. Bishop, now on file herein. I recollect definitely that the Chief Justice did say, in substance, that in connection with the service he rendered for one of the parties, he was consulted about the subject-matter of the present suits and expressed his opinion, at least, upon some phases thereof, and that in personal conference he had been advised of the facts and circumstances from the standpoint of one of the parties, and for that reason he was disqualified to act in the cases. As attorney for one of the parties herein, I then believed and now believe that upon his own public statement the Chief Justice was disqualified to act in said cases. I never intermeddled with the scruples of the Chief Justice about sitting under such circumstances, but have always acquiesced in his retirement from the case for the reason stated by him.

HALLECK F. ROSE.

* * * * * * *

204 STATE OF TEXAS,
County of Nueces, ss:

Thomas Bailey, being first duly sworn, on his oath says he is the plaintiff and appellee in the above cause, entitled Thomas Bailey, Appellee, v. Charles E. Yates, et al., appellants, No. 17279, now pending in the Supreme Court of the State of Nebraska.

Affiant further says that he is not personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska; that he has never at any time talked with, consulted, or made any statement of any kind or nature whatsoever, to the said Manoah B. Reese, about said cause, or regarding the issues therein, nor has he at any time, in any way or manner, either directly or indirectly talked to, conversed with, or consulted him regarding said cause, nor has affiant, either directly or indirectly, authorized any other person or persons to talk to, consult or converse with him regarding said cause, or any other cause pending in said court.

Affiant further says that one Harry T. Jones, of Seward, Nebraska,

who was an officer of the Jones National Bank of Seward, Nebr., and with whom affiant is acquainted, was never at any time authorized, requested, selected or permitted, in any way or manner, to represent this affiant in the conduct or management of affiant's said cause of action, and that affiant's said cause of action has been at all times since the commencement of same, in the charge and under the management of affiant's attorney of record in said cause.

Affiant further says that the said Manoah B. Reese, Chief Justice of said Supreme Court, was never at any time employed by affiant as his attorney in said cause, or otherwise, and that said Chief Justice Manoah B. Reese never at any time acted for affiant in said cause, as his attorney, nor has he at any time ever acted
205–210 for affiant as his attorney, in any cause or matter whatever; and affiant further says that the said Chief Justice, as your affiant verily believes, has no acquaintance, personal or otherwise, with affiant, and has never spoken to affiant upon any subject or matter whatever; and further affiant sayeth not.

THOMAS BAILEY.

* * * * * * *

211 These causes coming on to be heard upon motion of appellees for an extension of time within which to file briefs herein, *was* submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time be, and the same hereby is, sustained and appellees given until February 12, 1914, to serve and file briefs.

M. B. REESE,
Chief Justice.

* * * * * * *

212 THE STATE OF NEBRASKA,
Seward County, ss:

R. S. Norval, being first duly sworn, on his oath deposes and says that he is a regularly admitted and practicing attorney at the bar of this court, and has been such for the past forty years or more, and that ever since the year 1872 he has been engaged in the practice of law at the City of Seward, Nebr.

Affiant further says that he has been for the last twenty-five years and more, attorney for each of the plaintiffs in the above and foregoing entitled causes, and that some time after the failure of the Capital National Bank of Lincoln, Nebr., he was retained by said plaintiffs, and each of them, to represent their interests in the matters growing out of the failure of the said Capital National Bank.

Affiant further says that he is well and personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of this state, and has known him for over forty years; and he verily believes that he would have known the fact, if the Hon. Manoah B. Reese had ever been employed or consulted by the plaintiffs in either of said causes; and affiant states that the said Manoah B. Reese has never been so consulted or employed by either

of said plaintiffs; at least if he was, it was never brought to affiant's knowledge.

Affiant further says that at the time of the failure of the Capital National Bank, and for some time thereafter, it was not thought that the failure of said bank was of a serious nature, or that the depositors would suffer serious loss thereby; and there was no thought by either of the plaintiffs, of instituting suits against the officers or directors of said bank, until several months after its failure.

213 Affiant further says that he has participated in the prosecution of these suits, and has been present at all public hearings in this court, save one; that he was present when these cases were urged and submitted in this court in February, 1912; that the Chief Justice retired at that time; that while he cannot state the exact words the Chief Justice used at the time he retired, and which words were directed to his associates on the bench, rather than the public, he is quite positive that the said Manoah B. Reese did not then or at any other time, state he had acted as attorney for at least one of the plaintiffs in these cases or that he had more than one consultation with Mr. Harry T. Jones, one of the chief officers of the Jones National Bank; or that he had been fully advised of the facts and circumstances from the plaintiffs' standpoint, in these cases; or had expressed an opinion of the law and the facts therein, and that he might not be a fair and impartial judge to try the cases; or was disqualified under the law to sit or participate in them; or that he stated or used any other word or words of similar or like import or nature.

Affiant further says that he knows the relation that H. T. Jones has sustained towards each of the appellees in these causes, and he knows that he has never acted as their representative in any manner in these cases, except that he held certain property in trust for all of the plaintiffs, which was acquired by reason of certain executions levied upon the property of one A. P. S. Stewart, who was a former defendant in said causes.

Affiant further says that from his connection with said causes, as one of the attorneys for each of the appellees, and from his intimate knowledge of the litigation connected therewith, he

214 is quite certain that Hon. Manoah B. Reese was never at any time employed by either of said appellees, as attorney for them or either of them, in said causes, nor was he ever consulted as an attorney therein, by either of said appellees, or any one for them, and that he was never at any time, by said appellees or any one for them, advised of the facts and circumstances connected with said causes, from the plaintiffs' standpoint; and further affiant sayeth not.

R. S. NORVAL.

* * * * * * *

215 George Dobson being first duly sworn depose- and says as follows:

That from some time in 1892 until January, 1914, I was Cashier

of the First Bank of Ulysses and since said last date have been its President.

I was Cashier and manager of said Bank at the time of the failure of the Capital National Bank of Lincoln, Nebraska, in January, 1893.

I was informed of the failure of the Capital National Bank by telegram received from the First National Bank at Lincoln. This telegram reached me on Monday morning, January 23, 1893,
216 shortly before the train departed for Lincoln.

I took the train going by way of Seward and arrived at Lincoln shortly after 10 A. M. At Seward H. T. Jones who was then Cashier of the Jones National Bank joined me and we sat together and dicussed the failure of the Capital National Bank until we reached Lincoln. Upon our arrival, we immediately went to the place occupied by the Capital National Bank at Lincoln and found it in charge of Bank Examiner Griffith. While there some conversation took place with Mr. Griffith concerning some remittances that had been sent to the Capital National Bank on the Saturday preceding but I can not recall just what was said.

Mr. Jones and I were both acquainted with the Honorable Manoah B. Reese who was then practicing law at Lincoln and I think it was at my suggestion that we called to see him concerning the remittances above referred to. Mr. Reese accompanied us to the Capital National Bank building and it is my recollection that the remittances above referred to were returned. This ended all our transactions with Mr. Reese and we did not return to his office. I was with Mr. Jones during all of the time Mr. Reese was with him and I was with Mr. Jones the remainder of that day returning with him on the same train that evening.

I am quite certain there was no conversation had with Mr. Reese concerning any proposed suits against the officers or directors of the Capital National Bank and know that he was neither counselled nor retained in any such proposed litigation.

Mr. Jones and I conversed that day with a large number of persons residing at Lincoln and it was their universal opinion that the failure was not serious and that the depositors would suffer no loss and we came home that evening feeling that the banks we represented would sustain no loss on account of any deposits they had in the Capital National Bank.

At that time no examination had been made of the affairs
217 of the Capital National Bank and it was not known that there had been any irregularities or mismanagement in its affairs or that the reports and statements issued by the bank were in any particular false or incorrect.

Dated this 21st day of January, 1914.

GEORGE DOBSON.

* * * * * * *

218 I, H. T. Jones being first duly sworn depose and say as follows:

At the time I went to Lincoln on January 23, 1893, I did not know that the appellees, the Bank of Staplehurst, the Utica Bank or Thomas Bailey had any deposits in the Capital National Bank. I do not know just when I learned they had deposits but it was several weeks after my visit to Lincoln on the above date.

I did not know that there had been any frauds or irregularities in the management of the Capital National Bank nor that any statements of its financial condition, were in any respect incorrect, false or untrue until some time after Kent H. Hayden entered upon his duties as Receiver of said Bank.

219 & 220 Shortly after said bank failed, to-wit, on or about Feb. 6, 1893, Mr. McFarland was appointed Receiver of said Bank but resigned on May 4, 1893. Mr. Hayden was appointed Receiver to succeed Mr.McFarland and entered upon his duties as such Receiver on or about May 31, 1893 and it was perhaps during the month of June or July succeeding that I first learned of any of the irregularities, frauds and mismanagement in the bank's affairs.

On or about October 27, 1893, the Appellee Thomas Bailey commenced an action in the district court of Lancaster County, Nebraska, against certain of the officers and directors o fthe Capital National Bank. This case was removed to the Federal Court where a demur-er to the plaintiff's petition was sustained and the case dismissed.

The Appellee Jones National Bank commenced a similar action against certain of the officers and directors of the Capital National Bank in the District Court of Lancaster County, Nebraska on or about December 19, 1893, but it was dismissed on December 29, 1894. In neither of said actions in Lancaster County, Nebraska was the Appellant David E. Thompson a party. Neither I nor the Jones National Bank had anything whatever to do with the suit instituted by Thomas Bailey as aforesaid, and I have no knowledge that the Appellees, Bank of Staplehurst, or Utica Bank, instituted similar suits in Lancaster County. If they did I had nothing whatever to do with them.

The above entitled suits now before this Court for consideration were commenced in Seward County, Nebraska, on February 25, 1895.

H. T. JONES.

* * * * * * *

221 THE STATE OF NEBRASKA,
Seward County, ss:

I, J. J. Thomas, being first duly sworn depose and say that I am a regularly admitted and practicing attorney at the bar of this Court and have been for the past twenty years or more, and since 1891 have been engaged in the practice of law at Seward, Nebraska.

At the time of the failure of the Capital National Bank, Edward C. Biggs and I (under the firm name of Biggs & Thomas) were

the attorneys for the Jones National Bank and had been for several years preceding. And some time after the failure of the Capital National Bank our firm was retained by the Bank of Staplehurst, Appellee, to represent its interests in matters growing out of the failure of said Capital National Bank.

Mr. Biggs departed this life in March 1899 but I have been attorney for said parties in all their matters growing out of the failure of the Capital National Bank — am and have been familiar with all matters pertaining thereto.

I believe I would have known had the Honorable Mahoah B. Reese, Chief Justice, ever been attorney or counselled as an attorney in these cases on behalf of the above parties or either of them, and I state that he never has been so counselled or employed; at least if he was, it was never brought to my knowledge.

I know that at the time of the failure of the Capital National Bank and for some time thereafter it was not thought that the failure was of a serious nature or that the depositors would suffer thereby and there was no thought of instituting suits against the officers or directors until several months after the failure of the Bank.

I have actively participated in the prosecution of these suits and think I have been present at every public hearing in this
222 Court. I was present when these cases were argued and submitted to this Court in February 1912 and presented the argument on behalf of the appellees. I recall that the Chief Justice retired at that time. I could not state his words but it is my recollection that what he did say was directed to his associates rather than to the public.

I am quite certain that the Chief Justice did not then or at any other time state that he had been consulted and had acted as attorney for at least one of the plaintiffs in these cases, or that in more than one consultation with Mr. Harry T. Jones, a chief officer of the Jones National Bank, an appellee herein, he had been fully advised of the facts and circumstances from the plaintiffs' standpoint in these cases or had expressed his opinion of the law and the facts therein, or that he might not be a fair and impartial Judge to try the cases or was disqualified under the law to sit or participate in them, or that he uttered any words of similar or like import.

I recall that when these cases were argued upon appellees' motion for rehearing, the Court had taken an intermission immediately preceding the time these cases were reached for argument and that when the members of the Court reassembled to hear them, the Chief Justice did not return; but no remark was made by him or any other member of this Court as to why the Chief Justice did not sit at that time.

I know the relation that H. T. Jones has sustained toward each of the appellees herein, and I know that he has never acted as their representative in these cases except that he held certain property in trust for all the plaintiffs that was acquired as the result of executions levied upon the property of A. P. S. Stuart, a former defendant herein.

J. J. THOMAS.

* * * * * * *

223 The appellees the Jones National Bank and the Bank of Staplehurst respectfully represent to the Court that they have reason to believe that the Honorable William B. Rose, a mem-
224 ber of this Court is biased and prejudiced against the appellees herein and in favor of the appellant, David E. Thompson, to such an extent that he can not give the issues involved herein a fair, impartial and disinterested consideration and therefore protest and remonstrate against the right of the said William B. Rose to sit or participate in the decision or determination of these cases and respectfully request that he do not so sit or participate.

That the Court may be advised whether appellees' accusation is justified and based upon sufficient grounds, they present herewith the reason that has impelled them to challenge the right and propriety of the said Judge to Sit and participate in the decision of these cases.

1. It is well known to this Court that Halleck F. Rose an attorney at this bar, has throughout the entire proceedings in these cases been the chief, if not the sole, counsel for the appellant, David E. Thompson, and has upon all occasions when hearings have been had in this Court appeared on behalf of said appellant.

2. The said Halleck F. Rose is a brother of the Honorable William B. Rose, a member of this Court, between whom exists the closest ties of kinship.

3. For many years past, the appellant, David E. Thompson and his counsel, Halleck F. Rose, have been the very closest and most intimate friends and there has existed between them and now exists the closest ties of friendship, gratitude and personal interest: so that the said counsel, for reasons well known to himself, has as great an interest in the success of his client in these cases as though he himself were a party to said suit, and has throughout this litigation, for personal reasons manifested most unusual and intense zeal for the success of his client.

225 4. That the relationship existing between the appellant and his counsel is in a great measure shared by the said Judge Rose whose relations with the said appellant have likewise been of a very close and intimate nature for many years past; that by reason of said relationship the interest of said Judge Rose in the success of appellant and in the success, both professional and financial, of his brother is such that it is as potent and effective as though he had a direct personal and pecuniary interest in the outcome of this litigation.

5. In addition to the foregoing, appellees say that since the order of January 7, 1914 granting a rehearing herein they have been informed and upon information and belief allege the fact to be that Judge Rose at prior stages of this litigation prepared or assisted as said appellant's attorney in the preparation of briefs, both upon the law and facts on behalf of appellant, David E. Thompson, in these cases, as well as in other cases in which Halleck F. Rose appeared as counsel and attorney, of which facts appellees had no knowledge prior to said January 7, 1914.

6. That by reason of the foregoing, Judge Rose, prior to the submission of this cause, had unconsciously entertained a fixed and de-

termined opinion upon the merits of these cases and is biased and prejudiced therein in favor of said appellant and is therefore disqualified from giving the same impartial consideration.

7. That the conduct of Judge Rose in the consideration of these cases, has been that of a zealous advocate and intense partisan rather than an impartial Judge, is apparent from the records of the
226 proceedings in this cause, of which the Court will take judicial notice,—all of which clearly demonstrates the injustice and impropriety of his participation in these cases.

Dated this 11 day of February, 1914.

JONES NATIONAL BANK, *Appellee, and*
BANK OF STAPLEHURST, *Appellee,*
By J. J. THOMAS, *Their Attorney.*

* * * * * * *

227 On oral Application of attorney it is by the court ordered that appellants in above entitled causes be, and hereby are, given leave to file reply briefs by March 1, 1914.

M. B. REESE,
Chief Justice.

* * * * * * *

228 Supreme Court of Nebraska, January Term, A. D. 1914.
APR. 3.

No. 17277.

*BANK OF STAPLEHURST, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

The motion of appellant to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion is declared lost, and a rehearing denied.

*Reese C. J. not sitting.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

229 SEDGWICK, *J.*:

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I supposed as a matter of course there would at once be an unanimous court to set aside the former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order of judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done before so far as I know and it did not occur to me that any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to make use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refused to concur in setting aside the former order of this court. I think that such suggestions are improper; that
230 each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know. In the case of Shumway v. State, 82 Neb. 152, after full investigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event and the judgment was affirmed. The constitution provides that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgments of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality,

and thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the Clerk of Said Supreme Court a certain written statement made by Hon. John B. Barnes, one of the Judges of said Court, and which statement was entered of record on the Journal of said Court, and is in the words and figures following, to-wit:

231 Supreme Court of Nebraska, January Term, A. D. 1914.

Apr. 3.

No. 17277.

BANK OF STAPLEHURST, Appellee.
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

BARNES, *J.*:

When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the clerk of said supreme court, a certain Statement, of Hon. William B. Rose, one of the Judges of said Court, which said statement is in the words and figures following to-wit:

No. 17276.

JONES NATIONAL BANK
v.
YATES.

No. 17277.

BANK OF STAPLEHURST.
v.
YATES.

No. 17278.

UTICA BANK
v.
YATES.

No. 17270.

BAILEY.
v.
YATES.

ROSE, *J.*:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and had voted against plaintiffs' motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a solemn sense of duty to make and place on record the following statement:

232

I have never had any interest, direct, remote or contingent, in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though*t* I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from

participating in a case wherein his brother appears as an attorney, longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, 233 Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all my judicial acts and conduct. As a judge I can not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * * * *

1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th 1913, and January 7th 1914, granting a rehearing in these actions, for the following reasons, to-wit:

2. After appellees had filed their briefs herein in opposi- 234 tion to appellants' motions to set aside the orders of May 17th 1913, and January 7th 1914, the several appellants filed additional briefs herein on the 28th day of February 1914, and appellee herein had neither time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' brief heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law that after a judge had once withdrawn from a case that he had no right to reenter upon his duties, or that the parties had a right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein, a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court has set aside the order granting a rehearing herein and a constitutional majority of the court has not concurred in denying the motion of Appellee for a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a judge of the court granting such order, and appellee had, and now has a

constitutional right to have him give due consideration to this whole case.

235 8. Because said order of court deprives appellee of his property without due process of law.

9. Because said order is prohibited by and in conflict with the Fourteenth Amendment to the Constitution of the United States and denies to appellee equal protection of law and deprives appellee of his property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely on the ground, that the Chief Justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition, whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the cause had proceeded to final judgment operated *was* a judicial determination of his disqualification and effectually excluded him from further participation, although no facts existed constituting a disqualification, and although the Chief Justice'- withdrawal was based upon a mistake of facts.

That said reply brief tendered issues not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein, discloses that when the chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact that upon his discovery of the true facts it was his duty to participate in

236–239 the decision of said cases. And appellee had a constitutional right to all the judges in this court sitting in his case.

BANK OF STAPLEHURST.
By J. J. THOMAS,
R. S. NORVAL,
L. C. BURR,
Its Attorneys.

240 & 241 EXHIBIT A. H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

BANK OF STAPLEHURST, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, acting Chief Justice of the Supreme Court of Nebraska:

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which

was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme Court of the State of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioners.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction; that a citation be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
Acting Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 17,277. Bank of Staplehurst v. Yates. Petition for Writ of Error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

* * * * * * *

242 EXHIBIT "B."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

17277.

BANK OF STAPLEHURST, Appellee.
vs.
CHARLES E. YATES et al., Appellants.

Assignments of Error.

Comes now the said Bank of Staplehurst, Appellee in the above named court and assigns the following as manifest error upon the

face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit;

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of some thing more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States—in conflict with and opposition to the decision of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

243 7. The Court erred in finding and decision that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

8. The Court erred in finding and deciding that the evidence

in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provisions of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily and wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous interpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record, it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States; and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under Section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statements to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false

representation, knowingly made, and liable under section 5239, Revised Statutes of the United States.

14. The Court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

244 15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agent and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239 Revised Statutes of the United States in his personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making

r attesting such statement should have actual personal knowledge f the falsity thereof.

20. The Court erred in not deciding that by their attestation of he official published report shown by the record, the appellant lirectors affirmed and represented they had actual knowledge of the inancial condition of the bank and of the truthfulness of said state- ient, and if they made the same recklessly, without knowledge of ts truth or falsity, or concious that they had no knowledge of ts truthfulness, they are guilty of a false representation in effect nowingly made and liable under Section 5239 Revised Statutes f the United States.

21. The Court erred in deciding that the allegations of appellee's etition are insufficient to sustain the judgment against appellants nder Section 5239 Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because he opinion of Hamer J. as to the findings of fact is not concurred n by a constitutional majority of all the elected and qualified judges of this court,—Letton J. having only concurred on the law—and herefore the findings of fact of the trial court have not been re- versed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dis- nissing the case because the judgment is not concurred in and sup- ported by a majority of the duly elected and qualified judges of this court as provided in Article VI, Section 2, of the Constitu-
245 tion of the State of Nebraska—whereby appellee has been deprived of his property without due process of law and de- nied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the Constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing, and when the final order was made herein there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether attested by the require- ments of the national banking act or the common law action for fraud and deceit, and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to con- stitute a cause of action at the common law for fraud and deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was necessarily drawn in question the validity of an author- ity exercised under the United States, and the decision of said court was against its validity.

There was drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said statutes.

Wherefore appellee prays that the judgment of this court may

be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

[Endorsed:] 17277. Bank of Staplehurst v. Yates. Assignments of Errors. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

246-256 And on the same day, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 27.

No. 17277.

BANK OF STAPLEHURST, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon the assignments of error and petition for writ of error to the Supreme Court of the United States, by Bank of Staplehurst, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein, for their appearance in said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice of the Supreme Court of the State of Nebraska.

* * * * * * *

257 In the Supreme Court of the United States.

File No. 24241.

October Term, 1914. No. 502.

BANK OF STAPLEHURST, Plaintiff in Error,
vs.
CHARLES E. YATES, DAVID E. THOMPSON, and LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, Defendants in Error.

Designation for Printing.

The plaintiff in error in the above-entitled cause intends to rely on the assignments of error contained in the record and requests the clerk of the Supreme Court of the United States to print the following portion of the transcript of the record, which it thinks necessary for the consideration of such errors:

1. Transcript page 1: all of page, except præcipe.

2. Transcript page 5; amended petition, commencing with the words "afterwards, on the 16th day of March, A. D. 1889", and ending with signature- of attorneys on page 16.

3. Transcript page 17: exhibits A and B, commencing with the words "Exhibit A", and ending with the signature- of directors, near center of page 19.

4. Transcript page 21: answer of David E. Thompson, commencing with the words "afterwards, on the 15th day of July, A. D. 1901", and ending with the signatures of attorneys on page 26.

5. Transcript page 27: answer of Yates and Hamer, com-
258 mencing at top of page and ending at bottom of page 31.

6. Transcript page 32: reply of plaintiffs, commencing with the words "afterwards, on the 24th day of August, A. D. 1901", and ending at bottom of page.

7. Transcript page 34: Stipulation, commencing with the word "stipulation", immediately following the title, and ending at the bottom of page 35.

8. Transcript page 39: request for special findings, commencing with the words "afterwards, on the 17th day of February, A. D. 1911", and ending with the signature- of Attorneys, near bottom of page 47.

9. Transcript page 49: stipulation waiving jury, commencing at top of page, and ending with the words "court on January 30, 1911".

10. Transcript page 52: order permitting amendment, commencing with the words "and now on this first day of April, 1911", on sixth line from bottom, and ending with the second line at top of page 53.

11. Transcript page 61: special findings and judgment, commencing with third line at top of page and ending at bottom of page 64.

12. Transcript page 65: motion to amend petition, commencing with the words "motion for leave to amend petition (omitting title), and ending with signatures of attorneys on page 67.

13. Transcript page 67: Yates' motion for new trial, commencing wit the words "defendant, Charles E. Yates, moves the court", and ending with signature of attorney on page 75.

14. Transcript page 76: Hamer's motion for new trial,
259 commencing with the words "the defendant, Louisa P. Hamer, Admx., moves the court", and ending with the signature of attorney on page 83.

15. Transcript page 84: Thomuson's motion for new trial, commencing with the words "the defendant, David E. Thompson, moves the court", and ending with the signature- of attorneys on page 91.

16. Transcript page 92: findings and judgment, commencing at top of page and ending at bottom of page 96.

17. Transcript page 116: order of Supreme Court, commencing at top of page and ending at the bottom of page 134, (omitting in all cases title of the case).

18. Transcript page 135: motion for rehearing (omitting title), commencing at the top of page and ending with signature of attorney on page 144.

19. Transcript page 145: commencing with the words "on application of attorneys for appellee", and ending at bottom of page.

20. Transcript page 147: opinion of Sedgwick, J., commencing at top of page and ending at bottom of page 154.

21. Transcript page 155: last five lines from bottom of page.

22. Transcript page 156: last five lines at bottom of page.

23. Transcript page 158: commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice."

24. Transcript page 158: commencing with the words "Hamer, Rose and Barnes, JJ. dissent", and ending with the signature
260 "J. Fawcett, Acting Chief Justice", near top of page 159.

25. Transcript page 159: motion of Thompson, commencing with the words "appellant, David E. Thompson moves the court", and ending with signature- of attorneys on page 164.

26. Transcript page 164: affidavits commencing with the words "Halleck F. Rose, being first duly sworn", and ending with the signature "David E. Thompson", near bottom of page 170 (including affidavits of Rose, Stout and Thompson)—omitting certificates of notary.

27. Transcript page 173: motion of Yates and Hamer, commencing with the words "the appellants, Charles E. Yates and Louisa P. Hamer", and ending with signature- of attorneys at top of page 177.

28. Transcript page 178: affidavit of Frank E. Bishop commencing with the words "Frank E. Bishop, being first duly sworn", and ending with his signature near bottom of page 181.

29. Transcript page 184: statement of Reese, C. J., commencing

at top of page and ending at bottom of page 186, omitting last two lines.

30. Transcript page 187: affidavit of Lionel C. Burr, commencing with the words "Lionel C. Burr, being first duly sworn", and ending at bottom of page.

31. Transcript page 189: affidavit of Fritz Beckord, commencing at top of page and ending with his signature near the center of page 190.

32. Transcript page 191: affidavit of H. T. Jones, commencing with the words "H. T. Jones, being first duly sworn", and
261 ending with the signature near the center of page 195.

33. Transcript page 196: affidavit of Erick Jacobs, commencing at top of page and ending with his signature near bottom of page 197.

34. Transcript page 198: affidavit of Halleck F. Rose, commencing with the words "Halleck F. Rose, being first duly sworn", and ending with his signature near bottom of page 203.

35. Transcript page 204: affidavit of Thomas Bailey, commencing at top of page and ending with his signature near top of page 205.

36. Transcript page 211: commencing with the words "these causes coming on to be heard", and ending with the signature "M. B. Reese, Chief Justice", on same page.

37. Transcript page 212: affidavit of R. S. Norval, commencing at top of page and ending with the signature near top of page 214.

38. Transcript page 215: affidavit of George Dobson, commencing with the words "George Dobson, being first duly sworn", and ending with his signature near top of page 217.

39. Transcript page 218: affidavit of H. T. Jones, commencing with the words "I. H. T. Jones, being first duly sworn", and ending with his signature near the bottom of page 219.

40. Transcript page 221: affidavit of J. J. Thomas, commencing at top of page and ending at bottom of page 222.

41. Transcript page 223: Recusation of Judge Rose, commencing with third line from bottom of page and ending with signature- of attorneys, near top of page 226.

262 42. Transcript page 227: commencing with the words "on oral application of attorney", and ending with the signature "M. B. Reese, Chief Justice".

43. Transcript page 228: order of court, commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice", on same page.

44. Transcript page 229: statement of Sedgwick, Barnes and Rose, JJ., commencing at top of page and ending with tenth line from top of page 233.

45. Transcript page 233: motion for rehearing, commencing with the words "1. Comes now the appellee herein", and ending with the signature- of attorneys at top of page 236.

46. Transcript page 240: petition for writ of error. All of page.

47. Transcript page 242: assignments of error, commencing at top of page and ending with signature- of attorneys on page 245.

48. Transcript page 246: Allowance of writ of error. All of page.

BANK OF STAPLEHURST,
Pl'ff in Error.
By J. J. THOMAS, *Its Att'y.*

Rec'd copy of above designations this 21st day of August, 1914.

DAVID E. THOMPSON,
Def't in Error.
By STOUT, ROSE & WELLS,
His Attorneys.

263 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamar, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska. Commission Expires Oct. 8, 1912.]

S. C. STONER,
Notary Public.

264 [Endorsed:] 502/24,241. In the Supreme Court of the United States. Bank of Staplehurst, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. File No. 24,241. Oct. Term 1914. No. 502. Designation for printing. J. J. Thomas, Att'y for Pl'ff in Error.

265 [Endorsed:] File No. 24,241. Supreme Court U. S., October term, 1914. Term No. 502. Bank of Staplehurst, plaintiff in error, vs. Charles E. Yates, et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed August 25th, 1914.

266 In the Supreme Court of the United States.

October Term, 1914, No. 502.

File No. 24241.

BANK OF STAPLEHURST, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

Designation by Defendant in Error David E. Thompson of Additional Parts of the Record to be Printed.

David E. Thompson, one of the defendants in error in the above entitled case, states that he thinks it material that the following additional parts of the transcript of the record should be printed, and hereby designates and requests that the Clerk print and include in the printed record the parts of the transcript of the record in addition to the parts thereof designated by the plaintiff in error, namely:

1. The mandate of the Supreme Court of Nebraska, found on pages 37 and 38.

2. The motion of David E. Thompson for judgment in his favor on the special findings, found on pages 47 and 48.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson, Defendant in Error.

267 [Endorsed:] 502/24241. File No. 24,241. Octoer Term, 1914. No. 502. In the Supreme Court of the United States. Bank of Staplehurst, Plaintiff in Error, vs. Charles E. Yates et al., Defendants in Error. Designation by defendant in error, David E. Thompson, of additional parts of the record to be printed. Stout, Rose & Wells, 524 Omaha National Bank Bldg., Omaha, Nebraska, Counsel for David E. Thompson, Defendant in Error.

268 [Endorsed:] File No. 24,241. Supreme Court U. S., October term, 1914. Term No. 502. Bank of Staplehurst, Pl'ff in Error, vs. Charles E. Yates et al. Designation by David E. Thompson, defendant in error, of additional parts of record to be printed. Filed November 14, 1914.

Endorsed on cover: File No. 24,241. Nebraska Supreme Court. Term No. 502. Bank of Staplehurst, plaintiff in error, vs. Charles E. Yates, David E. Thompson, and Louisa Hamer, administratrix of the estate of Ellis P. Hamer. Filed May 26th, 1914. File No. 24,241.